

*Summer 2006*

### Rules Were Not Meant to be Broken: Alleviating the Tension Between Privacy and Discovery in Medical Record Disputes

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#### Recommended Citation

Anna C. Schumaker, *Rules Were Not Meant to be Broken: Alleviating the Tension Between Privacy and Discovery in Medical Record Disputes*, 40 Val. U. L. Rev. 845 (2006).

Available at: <https://scholar.valpo.edu/vulr/vol40/iss3/10>

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## RULES WERE NOT MEANT TO BE BROKEN: ALLEVIATING THE TENSION BETWEEN PRIVACY AND DISCOVERY IN MEDICAL RECORD DISPUTES

*We have strict statutes and most biting laws  
(The needful bits and curbs to headstrong weeds),  
Which for these fourteen years we have let slip.*<sup>1</sup>

### I. INTRODUCTION

William Shakespeare critiqued various approaches to law application within *Measure for Measure*.<sup>2</sup> As Vincentio, the Duke of Vienna, prepared to appoint the position of deputy to the strict law enforcer Angelo, he bemoaned that the lax attitude towards enforcement had effectively defeated the laws' existence.<sup>3</sup> Thus, Vincentio believed that a strict enforcer, such as Angelo, would improve the corrupt city; however, extreme strictness eventually proved ineffective as well, causing Vincentio to strike a balance that upheld the law but preserved humanity.<sup>4</sup>

The current application of law includes a similar tension despite the elaborate organization of society that involves laws, rules, and regulations, which various institutions enforce.<sup>5</sup> The judicial system is a prominent source of law application, where opposing parties utilize the adversarial system to protect personal interests.<sup>6</sup> Unlike *Measure for Measure*, where law enforcement involved quick judgments, each judicial proceeding in the adversarial system must follow rules of procedure.<sup>7</sup> Although these rules provide numerous and, at times, complex requirements, the intent of these rules is to provide just adjudication of

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<sup>1</sup> WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 1, sc. 3, ll.19-21 (G. Blakemore Evans ed., 2d ed. Houghton Mifflin Co. 1997).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at act 1, sc. 3, l.28.

<sup>4</sup> *Id.* at act 5, sc. 1.

<sup>5</sup> This Note focuses on the federal procedural rules that parties must follow in order to adjudicate claims in the federal courts. *See infra* text accompanying note 9. However, this Note also ties in federal regulations and statutes. *See supra* notes 76-82 and accompanying text (describing the federal regulations and statutes pertaining to the Health Insurance Portability and Accountability Act of 1996 ("HIPAA")).

<sup>6</sup> *See infra* Parts II.C.1-2 (setting forth the controversies that this Note addresses in detail).

<sup>7</sup> *See generally* FED. R. CIV. P.

every claim.<sup>8</sup> Thus, just as Vincentio served the purpose of the law by ultimately issuing a proportionate rather than authoritarian punishment, the federal courts should carry out the procedural rules' intent by striking an appropriate balance between competing interests.

The Federal Rules of Civil Procedure ("Rules"), governing the pretrial actions of parties, include the Rules of discovery.<sup>9</sup> Discovery becomes problematic due to the competing interests between applying the Rules of procedure and protecting the right to privacy that may be lost if parties must disclose documents during discovery.<sup>10</sup> Recent discovery decisions may have the effect of making these Rules "become[] more mock'd than fear'd."<sup>11</sup> Specifically, when comparing discovery decisions in courts addressing HIV-patients' medical records with courts addressing Congress' Partial-Birth Abortion Ban Act of 2003 ("PBAB"), the latter grants greater deference to the challenging parties.<sup>12</sup> Although disclosure of each type of medical record poses similar privacy infringement problems due to social stigmas associated with each class of patients, courts have applied the discovery Rules differently, causing confusion and inequitable Rule application.<sup>13</sup>

Setting the background to the discovery process, Part II describes the Rules of discovery, the fundamental right to privacy, and the cases applying the discovery Rules that attempt to reconcile the tension between discovery and privacy.<sup>14</sup> Next, Part III synthesizes the background information, criticizing the inaccurate interpretation of the discovery Rules and the inconsistency these decisions present in light of

<sup>8</sup> FED. R. CIV. P. 1. This Rule states: "[These rules] shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Id.*

<sup>9</sup> See generally FED. R. CIV. P. 26; FED. R. CIV. P. 45.

<sup>10</sup> See *infra* Part II.B. The Constitution does not explicitly provide that privacy is a fundamental right. Therefore, this Part sets forth the critical Supreme Court decisions regarding privacy as a fundamental right. See *Griswold v. Connecticut*, 481 U.S. 479, 482 (1965). Supreme Court cases, described *infra* Part II.B, addressing privacy of personal records, provide insight into the tension between discovery and privacy.

<sup>11</sup> SHAKESPEARE, *supra* note 1, at act 2, sc. 1; see *infra* Part II.C.2 (setting forth recent Partial Birth Abortion Ban ("PBAB") challenges).

<sup>12</sup> Compare *infra* Part II.C.1 with *infra* Part II.C.2.

<sup>13</sup> See generally *infra* Part III (analyzing the cases set forth *infra* Parts II.C.1-2 and criticizing inconsistent Rule application within these cases).

<sup>14</sup> Part II.A describes the procedural Rules of discovery to provide a basis for analyzing cases that apply these rules. See *infra* Part II.A. Next, Part II.B traces Supreme Court cases that have developed privacy as a fundamental right. See *infra* Part II.B. Part II.C applies Parts II.A and II.B by describing cases that address admission of medical records of HIV and partial-birth abortion patients. See *infra* Part II.C. A background to the federal PBAB, preceding the latter category of cases, provides the framework for these cases to clarify the nature of the claims and illustrate the timeliness of these decisions. See *infra* Part II.C.

other decisions and recent legislation.<sup>15</sup> Finally, Part IV expands and applies the analysis with a model approach to discovery disputes regarding medical records to provide a guide to the federal courts.<sup>16</sup>

## II. DISCOVERY RULES, PRIVACY, AND THE ADMISSIBILITY OF MEDICAL RECORDS

*Even like an o'ergrown lion in a cave,  
That goes not out to prey.*<sup>17</sup>

As the plot unfolded in *Measure for Measure*, when Angelo applied severe punishments to common crimes, Vincentio realized that just law enforcement required a balance between strictness and mercy.<sup>18</sup> The need for this balance appears in today's adversarial system, and the Rules provide the means for the federal courts to execute the just adjudication of disputes.<sup>19</sup> Specifically, the Rules of discovery play the indispensable role of providing efficient and productive means for adversaries to interact.<sup>20</sup> In order to maintain productivity, courts must apply these Rules flexibly, granting parties access to all relevant material in order to fully develop all possible legal arguments.<sup>21</sup> However, because parties may request sensitive information, such as medical records, courts must protect patients' privacy interests.<sup>22</sup>

To highlight the baseline Rules and intent of discovery, Part II.A begins by describing Rule 26 as the general background to the scope of discovery.<sup>23</sup> Additionally, this Part sets forth Rule 45, which allows

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<sup>15</sup> See *infra* Part III.

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> SHAKESPEARE, *supra* note 1, at act 1, sc. 3, ll.22-23. These lines extend Vincentio's view that laws become useless if not applied as intended. *Id.*

<sup>18</sup> *Id.* at act 1, sc. 1, ll.43-45. Essentially, in this passage, Vincentio tells Angelo, as he appoints his authority, to apply either the death sentence or grant the criminal mercy depending upon the situation. *Id.* Eventually, Angelo wishes to apply to a death sentence to a man who impregnated a woman. *Id.* at act 2, sc.1. Vincentio, realizing that Angelo was guilty of the same actions as Claudio, delegated punishments at the conclusion of the play. *Id.* at act 5, sc. 1. However, none of these punishments included the death sentence. *Id.*

<sup>19</sup> See FED. R. CIV. P. 1.

<sup>20</sup> See generally FED. R. CIV. P. 26, 45.

<sup>21</sup> See *infra* note 36 and accompanying text (describing the Advisory Committee's reasoning for allowing broad discovery).

<sup>22</sup> See *infra* Part II.B (describing the impact of privacy interests upon discovery requests).

<sup>23</sup> See *infra* Part II.A. Although this Note addresses Washington and Florida's rules of discovery, these rules are similar in intent and language to the federal Rule. See FLA. R. CIV. P. 1.280; WASH. SUPER. CT. CIV. R. 26. The background of Rule 26 explains the evolution of the Rule, including the intent of the Advisory Committee involved. See *infra*

## 848 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

parties to issue subpoenas for discovery and request orders to limit discovery.<sup>24</sup> Because privacy concerns arise in the discovery of medical records, Part II.B traces the development of privacy as a fundamental right through Supreme Court decisions.<sup>25</sup> Finally, Part II.C articulates the two categories of discovery disputes this Note addresses: (1) HIV-patients' medical records and (2) partial-birth abortion patients' medical records.<sup>26</sup>

A. Rules 26 and 45: Favoring Broad Disclosure

Under the current discovery Rules, Rule 26 controls the discovery period prior to trial where parties initially seek information for claims and defenses. Even though the general provisions of Rule 26 provide ample opportunity for discovery,<sup>27</sup> this Rule has been tailored to provide courts with the authority to limit the scope of a discovery request.<sup>28</sup> For

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notes 28, 30, 33–36 and accompanying text. Also, it expounds the conditions where parties may oppose and successfully refuse to comply with discovery requests. See *infra* text accompanying notes 39–48.

<sup>24</sup> See *infra* Part II.A. Because courts may choose to admit this material by requiring redaction, this Part addresses the redaction process for medical records. See 45 C.F.R. § 164.514(b)(2)(i) (2004) (delineating items to eliminate from medical records to ensure that they are not individually identifiable).

<sup>25</sup> See *infra* Part II.B. This Part focuses upon the U.S. Supreme Court's analysis of the differing types of privacy that receive constitutional protection. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (establishing that the First, Third, Fourth, Fifth, and Ninth Amendments contain guarantees that create zones of privacy). There are two types of privacy that the Supreme Court has established as protected: privacy to make decisions and privacy of personal records, the latter of which is the focus of this Note. See *infra* text accompanying notes 69–74. A brief description of HIPAA addresses the current methods of disclosing medical records. See *infra* text accompanying notes 75–82.

<sup>26</sup> Part II.C.1; see *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488 (N.D.N.Y. Feb. 7, 1991); *Doe v. Meachum*, 126 F.R.D. 444 (D. Conn. 1989); *Doe v. Puget Sound Blood Center*, 819 P.2d 370 (Wash. 1991); *S. Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985); see also *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004); *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004); *Nat'l Abortion Fed'n v. Ashcroft*, No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (E.D. Mich. Mar. 12, 2004); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383 (N.D. Cal. Mar. 5, 2004). A brief explanation of the PBAB precedes these cases to highlight the controversy surrounding these challenges. See generally 18 U.S.C.A. § 1531 (West Supp. 2005).

<sup>27</sup> FED. R. CIV. P. 26(b)(1). Within this subsection, the Rule states that "parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party." *Id.* The Rule describes the various materials that parties may obtain, which include documents. *Id.* Additionally, the Rule states that if a party shows good cause, he may discover material that is relevant only to the subject matter, and the material does not need to be admissible at trial. *Id.*

<sup>28</sup> FED. R. CIV. P. 26(b) advisory committee's note (1983). "The rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." *Id.*

example, in the interest of time and expense, Rule 26 authorizes courts to limit the extent of discovery.<sup>29</sup> Within this limitation, courts have the ability to consider substantive issues, such as policy or personal interests, but the Rules' intent requires that courts utilize these standards in an "even-handed manner."<sup>30</sup> It is imperative that lower courts apply these limitations carefully because appellate courts rarely address discovery decisions.<sup>31</sup>

The threshold inquiry in discovery disputes is whether the information is relevant to the litigation.<sup>32</sup> Relevance is an essential element within Rules 26 and 45, but it may be unclear whether a discovery request is outside the scope of these Rules.<sup>33</sup> The inquiry becomes ambiguous when the information sought is relevant to the

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<sup>29</sup> FED. R. CIV. P. 26(b)(2). This Rule sets forth three circumstances that permit the court to limit discovery:

The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues.

*Id.*

<sup>30</sup> FED. R. CIV. P. 26(b) advisory committee's note (1983):

Thus the rules recognize that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved. The court must apply the standards in an even-handed manner that will prevent the use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent.

*Id.*

<sup>31</sup> *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (holding that the Supreme Court would not review the district court's rulings on relevancy because the review was not within the boundaries of questions certified for review, but emphasizing that district courts cannot neglect their power to make discovery decisions); *ACF Indus. v. EEOC*, 439 U.S. 1081, 1087-88 (1979) (holding that the district courts are in the best position to control and curb the abuse of discovery, but that flagrant abuses of discovery may be addressed by courts of appeal).

<sup>32</sup> FED. R. CIV. P. 26(b)(1).

<sup>33</sup> FED. R. CIV. P. 26(b) advisory committee's note (2000). The Advisory Committee recognized that there is not a clear line between material that is relevant to the claims and defenses and material that is relevant only to the subject matter of the controversy. *Id.* Thus, the committee decided that the term "relevant" may include information relevant to the subject matter of the action if the court finds a showing of good cause supporting the discovery of the information. *Id.*

## 850 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

subject matter of the controversy but not directly related to the specific claims.<sup>34</sup> However, as long as the party requesting discovery can show good cause, defined as a legally sufficient reason, the court has the authority to order discovery of any material relevant to the subject matter of the litigation.<sup>35</sup> Rule 26 permits this flexible good cause standard because issues of relevancy inherently lack precision.<sup>36</sup> Ultimately, if the requesting party can show that the material is “reasonably calculated to lead to the discovery of admissible evidence,” then it satisfies the relevancy requirement of Rule 26.<sup>37</sup> Even so, the Supreme Court has encouraged the federal district courts to apply limitations where necessary “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” reaffirming Rule 26(c)’s intent to involve courts in discovery disputes.<sup>38</sup>

Due to parties’ unwillingness to volunteer potentially harmful information, they might not respond to a request for documents. Therefore, when the parties cannot successfully gain discovery materials through production requests, they may utilize Rule 45 and issue a subpoena.<sup>39</sup> According to Rule 45, when the requesting party serves the

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<sup>34</sup> *Id.* For instance, the requesting party in a dispute regarding whether a particular product was defective may subpoena information regarding other products the company manufactures. Although it may not be relevant to the claim at hand, information regarding other products may provide information relevant to the subject matter of the company’s manufacturing.

<sup>35</sup> *Id.*; see also BLACK’S LAW DICTIONARY 213 (7th ed. 1999) (defining good cause as a legally sufficient reason).

<sup>36</sup> FED. R. CIV. P. 26 advisory committee’s note (2000). The Advisory Committee emphasized that the court may become involved to determine whether certain discovery is relevant. *Id.* The courts should use the good cause standard in discovery determinations, and the committee emphasized that this standard is meant to be flexible. *Id.* The committee provided the example that “information that could be used to impeach a witness, although not otherwise relevant to the claims or defenses, might be properly discoverable.” *Id.* Although critics of this approach proposed that the committee delete the “subject matter” language to narrow the scope of discovery, the committee rejected this approach, delegating the courts with authority to address overbroad discovery. *Id.*

<sup>37</sup> FED. R. CIV. P. 26(b)(1); *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (“Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits.”).

<sup>38</sup> *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (encouraging district courts to use their authority to issue protective orders when appropriate); see FED. R. CIV. P. 26(c).

<sup>39</sup> FED. R. CIV. P. 45(c)(3)(A). Essentially, if the subpoena does not follow certain procedural requirements, demands a party or non-party to travel a long distance, or presents an undue burden, then the court must quash or modify the subpoena:

On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it  
(i) fails to allow a reasonable time for compliance;

opposing party with a proper subpoena, the serving party should avoid placing an undue burden upon the person subject to that subpoena.<sup>40</sup> Hence, parties that issue subpoenas under Rule 45 must show an initial consideration for the personal interests of the opposing party.<sup>41</sup>

Despite the issuance of a subpoena, the receiving party still may be unwilling to disclose the information requested. Thus, Rule 45 permits the receiving party to move the court to quash or modify the subpoena, providing a safeguard for parties' privacy rights.<sup>42</sup> Courts must quash or modify a subpoena if the party issuing the subpoena requests privileged or protected information.<sup>43</sup> When a party moves to quash or modify a subpoena on this ground, the moving party must support the objection by describing how the information is protected.<sup>44</sup>

Additionally, courts must quash or modify the subpoena when it "subjects a person to undue burden."<sup>45</sup> In this situation, the objecting

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- (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where the person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
  - (iii) requires a disclosure of privileged or other protected matter and no exception or waiver applies, or
  - (iv) subjects a person to undue burden.

*Id.*

<sup>40</sup> FED. R. CIV. P. 45(c)(1). If the requesting party does not achieve this standard, the party or attorney in breach will be subject to sanctions. *Id.*

<sup>41</sup> *See id.* For example, the requesting party should not subpoena information that is clearly of a sensitive or embarrassing nature without offering some sort of privacy protection for the producing party.

<sup>42</sup> FED. R. CIV. P. 45(c)(3)(A).

<sup>43</sup> *Id.* at 45(c)(3)(A)(iii); *see also* *Streett v. United States*, No. 96-m-6-H, 1996 U.S. Dist. LEXIS 19898, at \*13 (W.D. Va. Dec. 18, 1996) (remanding for a determination of whether the IRS information sought was privileged).

<sup>44</sup> FED. R. CIV. P. 45(d)(2). This subsection of Rule 45 sets the requirements that a party must meet in order to claim the material sought is privileged or subject to protection:

When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

*Id.*

<sup>45</sup> *Id.* at 45(c)(3)(A)(iv); *see also* *Anderson v. Shell Oil Co.*, No. 93-2235, 1996 U.S. Dist. LEXIS 7497 (E.D. La. May 23, 1996) (upholding a protective order issued to grant plaintiffs greater time than the opposing party offered in a subpoena for a deposition).



## 852 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

party must show that an undue burden exists,<sup>46</sup> and courts must balance the following factors: “the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the litigation, and importance of the proposed discovery in resolving the issues.”<sup>47</sup> Rule 45 encourages courts to modify the subpoena through redaction or a protective order.<sup>48</sup> Given that Rules 26 and 45 permit balancing “issues at stake in litigation,” courts may consider the rights of the parties involved.<sup>49</sup> Specifically, in objections to requests for medical

<sup>46</sup> *Alexander v. FBI*, No. 96-2123, 1998 U.S. Dist. LEXIS 11928, at \*15-16 (D.D.C. Mar. 13, 1998) (enforcing a Rule 45 subpoena for a deposition because the non-party to be deposed did not carry its burden for showing good cause for a protective order and steps had been taken to avoid placing an undue burden on the non-party); *Sentry Ins. v. Shivers*, 164 F.R.D. 255, 257 (D.C. Kan. 1996) (rejecting the claim that a second deposition was unduly burdensome because the party claimed only financial stress, which was a typical result of litigation).

<sup>47</sup> FED. R. CIV. P. 26(b)(2) (stating that the extent of the discovery methods may be limited upon a finding of undue burden); see *Linder v. Calero-Portocarrero*, 183 F.R.D. 314, 324 (D.D.C. 1998).

<sup>48</sup> FED. R. CIV. P. 26(c) sets forth the available protective orders:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters may not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;
- (6) that a deposition, after being sealed, be opened only by order of the court;
- (7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and
- (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

*Id.*; see also *Linder*, 183 F.R.D. at 321 (expressing that modifying subpoenas is preferred to outright quashing). Another means to modify a discovery request is redaction, which is the editing of a document to “remove confidential references or offensive material.” BLACK’S LAW DICTIONARY 1281 (7th ed. 1999). The encouragement of modification is significant because if subpoenas for medical records may be modified by eliminating individually identifiable information from all medical records, then discovery becomes feasible. See *infra* text accompanying notes 78-82 (describing that HIPAA protects only individually identifiable material). For further analysis of the value of protective orders to foster access to the courts, see Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What it Means and How it Operates*, 48 BAYLOR L. REV. 163, 174-75 (1996).

<sup>49</sup> See *infra* Parts II.C.1-2 (describing the cases where parties opposing the discovery of their medical records assert their privacy interests in such records).

records, courts consider the parties' interest in maintaining privacy.<sup>50</sup> Thus, the fundamental right to privacy validates courts' deference to privacy concerns in discovery disputes.<sup>51</sup>

*B. The Fundamental Right to Privacy: Not Absolute in Terms of Personal Records*

The Supreme Court has repeatedly held that privacy is a fundamental right, triggering a conflict between discovery and protecting patients' privacy.<sup>52</sup> The Constitution implicitly protects two distinguishable types of privacy: (1) the right to privacy of personal decisions, and (2) the right to privacy of personal information.<sup>53</sup> Although the Supreme Court has deemed both types of privacy to be fundamental rights, it has determined that the right to privacy of personal information is not absolute.<sup>54</sup>

The landmark Supreme Court case acknowledging that privacy to make personal decisions is a fundamental right is *Griswold v. Connecticut*.<sup>55</sup> In *Griswold*, the appellants were a licensed physician and a professor serving as a medical director for a Planned Parenthood League center.<sup>56</sup> After the trial court found the appellants in violation of two contraceptive statutes, several physicians challenged the statutes as a violation of the couple's Fourteenth Amendment rights.<sup>57</sup>

<sup>50</sup> See FED. R. CIV. P. 26(b)(iii); see also *infra* Parts II.C.1-2 (describing how courts examine the privacy interest involved in disclosure of medical records).

<sup>51</sup> See *infra* Part II.B.

<sup>52</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); *Whalen v. Roe*, 429 U.S. 589 (1977); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>53</sup> See *infra* notes 55-74 and accompanying text (describing the development of the right to privacy in personal decisions and the right to privacy of personal records).

<sup>54</sup> See generally *Whalen*, 429 U.S. 589.

<sup>55</sup> 381 U.S. 479 (1965).

<sup>56</sup> *Id.* at 480. At this center, the appellants provided medical information and advice regarding contraceptives to married persons. *Id.*

<sup>57</sup> *Id.* The two Connecticut statutes at issue addressed giving out and using information pertaining to avoiding conception: "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned." *Id.* (citing CONN. GEN. STAT. § 53-32 (1958)). "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* (citing CONN. GEN. STAT. § 54-196 (1958)). Additionally, the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added).

The Court conceded that the husband and wife had the right to make decisions regarding children free of government involvement.<sup>58</sup> Unfortunately, the Constitution did not offer explicit language regarding contraceptive rights, but it related the right to privacy to other fundamental rights.<sup>59</sup> To resolve this dispute, the Court explained situations where First Amendment rights have been attached to claims with attenuated connections to speech.<sup>60</sup> These connections allowed the Court to reach the important conclusion that the Bill of Rights provided “zones of privacy,”<sup>61</sup> which arose from the implicit assurances of the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>62</sup> Therefore, a governmental purpose to control activities could not invade areas of protected freedoms.<sup>63</sup> The Supreme Court thus concluded that the

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<sup>58</sup> *Griswold*, 381 U.S. at 482. The Court recognized that:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents’ choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

*Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 482–83. The Court introduced previous Supreme Court decisions that set the precedent that freedom of speech and freedom of the press involve the right to distribute, receive, and read, as well as the freedom of inquiry and thought. *Id.* Additionally, the Court upheld the precedent that the Constitution protects the freedom of association. *Id.* at 483.

<sup>61</sup> *Id.* at 484.

<sup>62</sup> *Id.* The Supreme Court reasoned:

Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

*Id.*

<sup>63</sup> *Id.* at 485. The Court found that the statutes at issue regulated the use of contraceptives, causing an adverse impact upon the relationship between the husband and wife. *Id.* at 485–86.

sacred relationship between husbands and wives was too private for the government to justifiably invade.<sup>64</sup>

The Supreme Court's recognition of the right to protect decisions within a spousal relationship has offered litigants the opportunity to argue that the "zones of privacy" reach beyond the narrow decision in *Griswold*.<sup>65</sup> In 2003, the Supreme Court reaffirmed the preservation of the fundamental right of privacy to make personal decisions in *Lawrence v. Texas*.<sup>66</sup> In *Lawrence*, the Court held that a Texas statute criminalizing

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<sup>64</sup> *Id.* at 486. Following this opinion, Justice Goldberg concurred, and Justice Brennan and the Chief Justice joined him. *Id.* (Goldberg, J., concurring). Justice Goldberg asserted that personal rights that are fundamental are not restricted to the language of the Bill of Rights. *Id.* This concurrence placed special emphasis on the Ninth Amendment's inclusion of other rights not specifically named in the Constitution. *Id.* at 487-88. Justice Harlan also wrote a concurring opinion, asserting that the Connecticut statutes were unconstitutional Due Process Clause violations of the Fourteenth Amendment, avoiding the incorporation approach of the majority and Justice Goldberg. *Id.* at 499-500 (Harlan, J., concurring). Justice White also utilized the Due Process Clause to declare the statutes unconstitutional in his concurrence. *Id.* at 502-03 (White, J., concurring).

Justices Black and Stewart dissented from this decision, arguing that a more flexible interpretation of the constitutional Amendments effectively dilutes their meaning. *Id.* at 509-10 (Black, Stewart, JJ., dissenting). Justice Stewart wrote a second dissenting opinion, criticizing the majority for not specifying which amendments guaranteed the right to marital privacy. *Id.* at 528-29 (Stewart, J., dissenting).

Many subsequent cases have discussed and expanded the holding in *Griswold*. *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (explaining that *Griswold* recognized a right to be free from governmental intrusion regarding the personal decision to bear children); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (explaining that *Griswold* did not establish a framework clarifying how to handle cases that address those fundamental rights); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding a New York statute prohibiting the sale of contraceptives to minors unconstitutional); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1976) (reasserting the constitutional protection of the sanctity of family by reversing a conviction for violating an ordinance allowing only immediate families to reside together); *see also* notes 65-68 and accompanying text (describing further the expansion of *Griswold*).

<sup>65</sup> *See generally* *Washington v. Glucksberg*, 521 U.S. 702 (1997) (asserting that the right to privacy did not extend to a right to assisted suicide due to the history, legal traditions, and practice supporting criminalizing assisted suicide); *Carey*, 431 U.S. 678 (holding a statute unconstitutional that prohibited selling contraceptives to minors); *Runyon v. McCrary*, 427 U.S. 160 (1976) (rejecting the argument that the right of parents to control the upbringing of their children should preclude the government from regulating the schools to avoid racial discrimination); *United States v. Orito*, 413 U.S. 139 (1973) (holding that the Constitution does not safeguard sending obscene materials into the stream of commerce); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973) (rejecting the claim that the right to privacy included a right to watch obscene movies in places of public accommodation); *United States v. Van Leeuwen*, 397 U.S. 249 (1970) (asserting a privacy interest in first-class mail); *DeGregory v. Att'y Gen. of N.H.*, 383 U.S. 825 (1966) (holding that the Constitution protected the privacy interest within political and associational information).

<sup>66</sup> 539 U.S. 558 (2003). Justice O'Connor concurred with Justice Kennedy's opinion that the statute violated the Due Process Clause of the Fourteenth Amendment, citing the Equal

## 856 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

sodomy violated the Due Process Clause of the Constitution.<sup>67</sup> The Court reasoned that the fundamental right of privacy extended to an adult's right to make decisions regarding his private behavior.<sup>68</sup>

Beyond the right to make decisions, another "zone" for protection under the fundamental right to privacy is personal records.<sup>69</sup> As this is a fundamental right, a party seeking discovery of personal records must show a compelling governmental interest that supports disclosure of the records.<sup>70</sup> Although a compelling interest is a difficult burden to meet, the Supreme Court determined that disclosure of personal records was insufficient to preclude discovery in *Whalen v. Roe*.<sup>71</sup> The Court, considering the constitutionality of a drug reporting statute, held that unintended disclosures resulting from judicial use of records was an insufficient reason to invalidate the statute.<sup>72</sup> The Court ultimately upheld the reporting statute because the arguments that the statute precluded public access to drugs and impeded the right to practice medicine were unpersuasive.<sup>73</sup> Thus, the argument that unintended public disclosures of medical information invalidated the statute did not

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Protection Clause of the Fourteenth Amendment as the reason why the statute banning sodomy was unconstitutional. *Id.* at 579. Justices Scalia, Thomas, and the Chief Justice dissented, and Justice Scalia criticized the Court for overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), which flatly refused to create a fundamental right to practice sodomy. *Id.* at 586 (Scalia, J., dissenting). Justice Thomas wrote separately to assert that the right to privacy was not explicit in the Constitution so the Supreme Court should not apply it. *Id.* at 605 (Thomas, J., dissenting).

<sup>67</sup> *Id.* at 578 (majority opinion).

<sup>68</sup> *Id.* ("[T]he case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

<sup>69</sup> See *Hahnemann Univ. Hosp. v. Edgar*, 74 F.3d 456 (3d Cir. 1996) (asserting that the Constitution protected the confidentiality of psychologists' records due to the patients' privacy interests); *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1996) (remanding the case to determine whether information was confidential under the common law right to privacy).

<sup>70</sup> *Brilliantes v. Sup. Ct.*, 51 Cal. App. 4th 323, 339 (Cal. Ct. App. 1997) (finding that the state had a compelling interest to examine medical records that were a part of a fraud investigation).

<sup>71</sup> 429 U.S. 589, 602 (1977). In *Whalen*, the Court reasoned that the disclosure of sensitive medical information to qualified individuals was a necessary aspect of medicine. *Id.* Moreover, states that require disclosures were practicing their responsibility to the health of the community. *Id.* at 602 n.29. Thus, the disclosure would not be an automatic impermissible invasion to privacy. *Id.* at 602.

<sup>72</sup> *Id.* at 601-02.

<sup>73</sup> *Id.* at 602-04.

persuade the Supreme Court, showing that the public interest may at times require disclosure.<sup>74</sup>

In addition to the Court's attitude towards disclosing medical records, current legislation provides the manner in which Congress intends courts to treat discovery requests for medical records.<sup>75</sup> Many states have statutes regarding health care information, but a recently promulgated federal statute, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),<sup>76</sup> applies unless the state law preempts.<sup>77</sup> Stated generally, HIPAA protects individually identifiable health information within medical records from disclosure without patient consent,<sup>78</sup> but HIPAA places no restrictions on information that has been purged of identifiable information.<sup>79</sup> Congress enacted HIPAA

<sup>74</sup> *Id.* at 602 (describing that the Court and the states recognized that disclosure of records may actually serve public policy). For further discussion of the right to privacy of records, specifically medical records, see Note, *The Evolution of the Right to Privacy After Roe v. Wade*, 13 AM. J.L. & MED. 368, 399-400 (1987) ("[C]ourts have allowed the nonconsensual disclosure of medical records on the grounds that privacy must yield to the needs of society as reflected in the criminal justice system."). See generally Melissa E. Rosenthal, *Liberal Discovery of Non-Party Records: In Defense of the Defense*, 7 CARDOZO WOMEN'S L.J. 59 (2000) (discussing New York decisions pertaining to the discovery of non-parties that comment on the extensive intent of discovery).

<sup>75</sup> See *infra* text accompanying notes 76-82.

<sup>76</sup> 42 U.S.C.A. § 1320d-6(b) (West Supp. 2005); Health Insurance Portability and Accountability Act of 1996, Pub. L. 104-191, 1996 U.S.C.A.N. (110 Stat. 1936) 1865; see also *infra* notes 79, 81 and accompanying text (describing federal regulations promulgated to carry out HIPAA that are relevant to this Note).

<sup>77</sup> 45 C.F.R. § 160.203 (2004). Generally, the Secretary may determine that federal law does not preempt state law in order to prevent fraud, to assure that the state may regulate insurance and health plans, to comply with state reporting for health care purposes, or to serve a compelling need "related to public health, safety, or welfare, and . . . if the Secretary determines that the intrusion into privacy is warranted when balanced against the need to be served." *Id.* For purposes of this Note, the state statutes that HIPAA may preempt address whether patients must consent to disclosure of their medical records. See 735 ILL. COMP. STAT. 5/8-802 (2004) (prohibiting health care personnel from disclosing any information obtained in working with any a patient without express consent, but providing several exceptions, such as trials for homicide or actions against the healthcare provider); N.Y.C.P.L.R. 4504(a) (2005) (requiring patient consent before disclosure).

For further information regarding HIPAA's preemption of state health care statutes, see Jennifer Gunthrie, *Time is Running Out—The Burdens and Challenges of HIPAA Compliance: A Look at Preemption Analysis, the "Minimum Necessary" Standard, and the Notice of Privacy Practices*, 12 ANNALS HEALTH L. 143, 149-52 (2003), and Adam Butera, Note, *HIPAA Preemption Implications for Covered Entities Under State Law*, 8 CONN. INS. L.J. 363, 378-81 (2001-2002).

<sup>78</sup> United States Department of Health and Human Services, Summary of the HIPAA Privacy Rule, 4, available at <https://www.hhs.gov/ocr/privacysummary.pdf> (last revised Oct. 5, 2003).

<sup>79</sup> See *id.* Within this explanation of HIPAA, there is an explanation of the treatment of de-identified health information, or information that does not identify or excludes

to protect individual medical information, and it provides a workable definition of individually identifiable material to determine what information HIPAA protects.<sup>80</sup> In accordance with Congress' intent, HIPAA has set regulations for redaction, which protect patients' identities while permitting disclosure of the medical records.<sup>81</sup>

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information that could cause identification of an individual. *Id.* HIPAA does not restrict the use or disclosure of such information based on the provisions of the following federal regulation:

(1) Uses and disclosures to create de-identified information. A covered entity may use protected health information to create information that is not individually identifiable health information or disclose protected health information only to a business associate for such purpose, whether or not the de-identified information is to be used by the covered entity.

(2) Uses and disclosures of de-identified information. Health information that meets the standard and implementation specifications for de-identification under § 164.514(a) and (b) is considered not to be individually identifiable health information, *ie.*, de-identified. The requirements of this subpart do not apply to information that has been de-identified in accordance with the applicable requirements of § 164.514, provided that:

(i) Disclosure of a code or other means of record identification designed to enable coded or otherwise de-identified information to be re-identified constitutes a disclosure of protected health information; and

(ii) If de-identified information is re-identified, a covered entity may use or disclose such re-identified information only as permitted or required by this subpart.

45 C.F.R. § 164.502(d) (2004).

<sup>80</sup> 42 U.S.C.A. § 1320d-6(b). This statute states:

(B) [Information that] relates to the past, present, or future physical or mental health or condition of an individual, the provision of health care to an individual, or the past, present, or future payment for the provision of health care to an individual, and —

(i) identifies the individual; or

(ii) with respect to which there is a reasonable basis to believe that the information can be used to identify the individual.

*Id.* This definition is helpful in analyzing whether the disclosure of medical records violates the fundamental right to privacy. *See infra* Part III.

<sup>81</sup> See 45 C.F.R. § 164.514(b)(2)(i), which lists the information that must be excluded from medical records to ensure that the records are not individually identifiable:

(A) Names;

(B) All geographic subdivisions smaller than a State, including street address, city, county, precinct, zip code, and their equivalent geocodes, except for the initial three digits of a zip code if, according to the current publicly available data from the Bureau of the Census:

(1) The geographic unit formed by combining all zip codes with the same three initial digits contains more than 20,000 people; and

According to HIPAA's regulations, redaction sufficiently serves the purpose of protecting patients' privacy.<sup>82</sup>

C. *Two Categories of Cases Addressing Admissibility of Medical Records*

The non-absolute protection of medical records,<sup>83</sup> reflected in the Supreme Court's decisions as well as Congress' HIPAA, has emerged in cases addressing disclosure of Human Immuno-Deficiency Virus ("HIV") patients' medical records and challenges to the constitutionality of the PBAB.<sup>84</sup> Although the use of medical records in judicial disputes is quite common, certain types of medical information may contain sensitive information capable of harm if brought into the public

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- (2) The initial three digits of a zip code for all such geographic units containing 20,000 or fewer people is changed to 000.
  - (C) All elements of dates (except year) for dates directly related to an individual, including birth date, admission date, discharge date, date of death; and all ages over 89 and all elements of dates (including year) indicative of such age, except that such ages and elements may be aggregated into a single category of age 90 or older;
  - (D) Telephone numbers;
  - (E) Fax numbers;
  - (F) Electronic mail addresses;
  - (G) Social security numbers;
  - (H) Medical record numbers;
  - (I) Health plan beneficiary numbers;
  - (J) Account numbers;
  - (K) Certificate/license numbers;
  - (L) Vehicle identifiers and serial numbers, including license plate numbers;
  - (M) Device identifiers and serial numbers;
  - (N) Web Universal Resource Locators (URLs);
  - (O) Internet Protocol (IP) address numbers;
  - (P) Biometric identifiers, including finger and voice prints;
  - (Q) Full face photographic images and any comparable images; and
  - (R) Any other unique identifying number characteristic, or code, except as permitted by paragraph (c) of this section.

*Id.*

<sup>82</sup> See *id.* For further discussion the application of HIPAA, see Elliot B. Oppenheim, *HIPAA 2004—A Review of Significant Litigated Cases*, 1-5 MEALEY'S PRIVACY REP. 25 (2004), which describes that only three cases have deeply addressed "the statute's length and breadth and intent," one of which was *Northwestern Memorial Hospital v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). See *infra* Part II.C.2.

<sup>83</sup> See EMANUEL HAYT, LL.B., *LEGAL ASPECTS OF MEDICAL RECORDS* 195 (Physician's Record Co. 3d ed., 1973). Hayt notes that when patients enter a hospital and receive treatment, the patients' expectation of privacy must change. *Id.* The hospital may disclose information in response to public interest because of the nature of the treatment or the position of the patients within society. *Id.*

<sup>84</sup> See *infra* Parts II.C.1-2.



spectrum.<sup>85</sup> Specifically, disclosing the records of HIV-patients has proven to be socially detrimental because of the negative stigmas and fears attached to this virus.<sup>86</sup> Additionally, disclosing medical records of partial-birth abortion patients is harmful to those patients due to current attitudes towards this controversial procedure and the “lifelong stigma of unwed mothers.”<sup>87</sup>

<sup>85</sup> See *infra* notes 86–87 and accompanying text.

<sup>86</sup> See *infra* note 93; see also SHARON RENNERT, AIDS/HIV AND CONFIDENTIALITY: MODEL POLICY AND PROCEDURES 18, 90–92 (A.B.A. 1991) (describing the ways in which disclosure of infection has negative social ramifications). Rennert offers background information pertaining to the HIV virus and AIDS. *Id.* at 91–92. Generally, this attitude stems from fear of contracting the disease and the belief that the disease is associated with socially unacceptable behavior and immorality. HIV & AIDS: Stigma & Discrimination, <http://www.avert.org/aidsstigma.htm> (last revised Nov. 30, 2004) (describing that discrimination and increased social rejection of homosexuals, injecting drug users, and sex workers have resulted from this disease). A few specific effects of this negative stigma are harassment; murder in several countries; and financial, social, and medical disadvantages for women. *Id.* The social stigma for women is that they are the sole source of sexually transmitted diseases. *Id.* Also, discrimination in the workplace occurs through pre-employment screening in some countries. *Id.*; see also United States HIV & AIDS Statistics Summary, <http://www.avert.org/statsum.htm> (last revised Dec. 23, 2004) (showing the widespread legislative response to the negative stigmas). This statistical summary states:

Since 1999, the following 33 areas have had laws or regulations requiring confidential name-based HIV infection reporting: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin, Wyoming, and the US Virgin Islands. Since July 1997, Florida has had confidential name-based HIV infection reporting only for new diagnoses.

*Id.* For a general analysis of the discovery of HIV-patient records that supports limited disclosure, see Amy L. Fisher, Note, *AIDS: The Life and Death Conflict Between Confidentiality of Blood Donors and the Recovery of Blood Recipients*, 42 WASH. U. J. URB. & CONTEMP. L. 283 (1992).

<sup>87</sup> J.C. Willke, *A Health Exception*, LIFE ISSUES CONNECTOR, Oct. 2004, at 1; see HOWARD BALL, *THE SUPREME COURT IN THE INTIMATE LIVES OF AMERICANS: BIRTH, SEX, CHILDREARING, AND DEATH* 114–15 (N.Y. Univ. Press 2002) (describing the procedure, whose graphic nature contributes to this attitude). Ball describes that the development of the PBAB was a result of the National Right to Life Committee’s campaign that focused on the arguably inhumane nature of the procedure:

It is a three-day procedure generally performed between the twentieth and twenty-fourth weeks of pregnancy, the mid term of the pregnancy. On the third day, the physician removes the fetus from the woman’s uterus. “However, the head, which is too big to pass through the dilated cervix, remains in the internal cervical opening. At this point, the physician takes a pair of blunt curved scissors and forces scissors into the base of the skull.” This enables the doctor to remove the skull contents with a suction device. “The head will then compress,

Both sets of patients face the possibility of strong social criticism if their identities and medical information become public. Thus, courts treat the parties' privacy loss due to disclosure of their medical records as an undue burden.<sup>88</sup> Hence, a logical assumption is that courts apply the privacy concern in a similar fashion in both types of cases. However, deference to privacy arguments within these two categories differs.<sup>89</sup> Examining cases where parties seek medical records of HIV-patients and partial-birth abortion patients exemplifies the difficult application of the discovery Rules.<sup>90</sup> Because both categories address the "undue burden" objection to discovery, the courts in each case considered the "issues at stake" in the litigation by balancing the importance of privacy, government interest, and social policies.<sup>91</sup> However, the reasoning applied regarding privacy infringement within the two classes of cases differs.<sup>92</sup>

### 1. HIV-Patient Controversies

Within the first class of cases, the medical records sought included records pertaining to HIV.<sup>93</sup> In *Doe v. Puget Sound*,<sup>94</sup> a discovery order required a blood center to provide the name of a person who donated

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enabling the physician to remove the fetus completely from the woman."

*Id.*; see also Shannen W. Coffin, *The Abortion Distortion: What the 'Pro-Choice' People Have Done to Law, Medicine, and Language*, NAT'L REV., July 12, 2004 ("[T]he abhorrent partial-birth method, in which a doctor delivers a living child until its legs and torso are hanging outside the mother and then pierces the child's skull with a sharp instrument and vacuums out its brains.").

<sup>88</sup> See *infra* Parts II.C.1-2.

<sup>89</sup> Compare *infra* Part II.C.1 with *infra* Part II.C.2.

<sup>90</sup> See *infra* Parts II.C.1-2.

<sup>91</sup> See FED. R. CIV. P. 26(b)(2).

<sup>92</sup> Compare *infra* Part II.C.1 with *infra* Part II.C.2.

<sup>93</sup> See *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488 (N.D.N.Y. Feb. 7, 1991); *Doe v. Meachum*, 126 F.R.D. 444 (D. Conn. 1989); *Doe v. Puget Sound Blood Center*, 819 P.2d 370 (Wash. 1991); *S. Fla. Blood Serv. v. Rasmussen*, 467 So. 2d 798 (Fla. Dist. Ct. App. 1985). In *Rasmussen*, the court described the sensitivity associated with AIDS patients as a result of the high mortality rate. 467 So. 2d at 800. Researchers found that certain groups of people, such as bisexual or homosexual people with multiple sex partners, drug users, hemophiliacs, heterosexual partners of AIDS victims, and blood transfusion recipients each have a higher risk of infection with the virus. *Id.* The gravity of this disease has caused reactions of fear within society. *Id.* Therefore, the individuals with AIDS must deal with "social censure, embarrassment and discrimination in nearly every phase of their lives, including jobs, education and housing." *Id.* at 800. Thus, a reasonable inference regarding AIDS or HIV-infected individuals is that the disclosure of this information would have a significant and detrimental effect on their lives. See *id.*

<sup>94</sup> 819 P.2d 370 (Wash. 1991).

## 862 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

blood to the center.<sup>95</sup> The plaintiff received blood during an emergency surgery that was contaminated with the Acquired Immuno-Deficiency Syndrome ("AIDS") virus, and he consequently died.<sup>96</sup> As a result, the plaintiff's estate claimed that the blood center was liable for failing to design an effective screening process and requested the identity of the AIDS-infected donor in order to evaluate the blood center and possibly pursue a negligence claim against the donor.<sup>97</sup> On appeal, the blood center argued that the donor's identity was privileged, that nondisclosure was justified, and that the court must recognize and protect the donor's privacy; the Supreme Court of Washington disagreed.<sup>98</sup>

Balancing the interests involved, the Washington Supreme Court first recognized the plaintiff's interest, given the constitutional guarantee of access to the courts and the importance of the plaintiff's need for discovery to develop the claims against the blood center and a possible claim against the donor.<sup>99</sup> Next, the court concluded that the donor's privacy right held little weight given that the donor had died.<sup>100</sup> Further,

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<sup>95</sup> *Id.* at 372.

<sup>96</sup> *Id.* Because the plaintiff died as a result of the virus, his estate continued the suit after his death. *Id.* Additionally, the donor died because of complications arising from the AIDS virus. *Id.*

<sup>97</sup> *Id.* At the trial court, the plaintiff sought an order to compel the identity of the AIDS-infected donor. *Id.* The trial court granted disclosure upon the condition that the information remain confidential until the donor was named as a defendant. *Id.* According to WASH. REV. CODE § 70.54.120 (1987), negligence principles apply to determine whether those responsible for the blood transfusion may be civilly liable. *See generally In re Rogers v. Miles Labs., Inc.*, 116 Wn.2d 195 (Wash. 1991).

<sup>98</sup> *Puget Sound*, 819 P.2d at 373. The court held that:

(1) the statutory physician-patient privilege does not apply; (2) we will not consider whether there is a common law privilege because this argument was not presented to the trial court; (3) the interests of plaintiffs, defendant, and Donor X are competing and conflicting interests, but after identifying and weighing those interests, we do not find an abuse of discretion by the trial court; and (4) on this record we cannot decide the claim of privacy asserted on behalf of the deceased donor.

*Id.*

<sup>99</sup> *Id.* at 375-76. This right to access included the right to broad and extensive discovery.

*Id.*

<sup>100</sup> *Id.* at 376. The court conceded that disclosure of such information posed a threat to "family relationships, job security, employability and the ability to obtain credit, insurance and housing." *Id.* However, the donor died, leaving the court to draw the conclusion that justifications for maintaining privacy were lost. *Id.* The blood center argued that the court should defer to the donor's privacy right because the record addressed "extremely private and embarrassing matters" that Washington's discovery rule could protect from disclosure. *Id.* at 377. Because the record of the case did not provide insight regarding how the donor's

the court was reluctant to accept the blood center's policy arguments because the information asserted in support of the policy argument against disclosure was not in the record.<sup>101</sup> However, the court addressed the public policy claim because of the possibility that privacy loss would cause an undue burden.<sup>102</sup> The court conceded that an adequate blood supply was necessary and questioned the severity of the impact of disclosure in this particular instance, but the court reasoned that these policy claims were mere speculation and upheld the trial court's order for disclosure.<sup>103</sup>

In *Doe v. Meachum*,<sup>104</sup> the District of Connecticut approached a discovery dispute in a slightly different fashion from the court deciding *Puget Sound*, promoting discovery and protecting privacy by ordering production of medical records subject to protective orders.<sup>105</sup> In *Meachum*, a class of inmates of the Connecticut Department of Corrections asserted civil rights objections to the department's policies

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information was used following his or her death, the court did not reach a final decision on the donor's privacy right at stake. *Id.*

The blood center also argued that the policy interest of maintaining an adequate blood supply outweighed the plaintiff's interest, emphasizing the overall importance of keeping donor information confidential. *Id.* According to the court, asserting a public policy argument would be a valid basis for a judicial decision. *Id.* However, the court maintained that in making such a decision, it must clearly identify the "sources of facts or opinions" that provoked the decision. *Id.* Therefore, decisions based upon public policy must rely on the materials within the record of the case. *Id.* The blood center claimed that blood donation would decrease without protection from disclosure. *Id.* Also, the blood center argued that it already implemented cautious screening mechanisms that served the purpose of excluding donors with infectious diseases. *Id.*

<sup>101</sup> *Id.* at 377-78. Although the information may have been correct, the court would not accept this policy argument absent a strong indication within the record. *Id.* Also, the court indicated that certain aspects of the policy claim would have required an expert witness for support, but the record did not show that the witnesses were qualified as experts. *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* The blood center identified the consequences of disclosure: "(1) [D]onors will be less likely to donate blood if they know their identity may be disclosed and inquiries may be made about them, and (2) the possibility of disclosure will encourage donors to give false or inaccurate information when donating." *Id.* at 378. In rejecting the blood center's argument, the court countered that "the true public interest is an uninfected blood supply and therefore, public policy *should* discourage donors who are in high risk groups." *Id.* at 379.

For a discussion and criticism of this decision that argued for a special protection of blood donors, see generally Ann Marie LoGerfo, Note, *Protecting Donor Privacy in AIDS Related Blood Bank Litigation – Doe v. Puget Sound Blood Center*, 117 *Wash. 2d* 772, 819 P.2d 370 (1991), 67 *WASH. L. REV.* 981 (1992).

<sup>104</sup> 126 F.R.D. 444 (D. Conn. 1989).

<sup>105</sup> *Id.*

## 864 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

regarding HIV-infected patients.<sup>106</sup> In order to evaluate the treatment of these patients, the inmates requested medical records.<sup>107</sup> One of the many production requests was for medical and mental health records of the HIV-infected inmates.<sup>108</sup> As a result, the court addressed the extent of the HIV-infected inmates' privacy rights, finding that the probative value of the material outweighed the privacy concern.<sup>109</sup>

The court resolved the dispute in *Meachum* by evaluating four factors to determine whether a privacy privilege existed.<sup>110</sup> The court carefully analyzed the first factor, addressing the necessity of disclosing the inmates' identities and concluded that disclosure was necessary to the plaintiffs' evaluation of the department's policies.<sup>111</sup> The court reasoned that the second and third factors, requiring the narrowest invasion of privacy possible, favored disclosure because both parties filed protective orders that would preclude public disclosure.<sup>112</sup> Finally, the fourth element, asking whether the information was necessary and desirable,

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<sup>106</sup> *Id.* at 446. As this was a class action suit, the defendants argued that Rule 23(d)(2) required consent from each class member to justify disclosure, but the court disagreed. *Id.* The defendants asserted that without consent, the court must allow only some of the medical records in a redacted form. *Id.* at 448-49. In ultimately admitting the medical records, the court agreed somewhat with this argument, limiting the discovery to medical records pertaining to HIV-patient records only. *Id.* at 449-50.

<sup>107</sup> *Id.* at 447-48. The requests included lists of weekly blood drawings, incident reports, lab invoices, quarterly and annual reports, documents on hospitalization, and documents on suicides or attempted suicides. *Id.* at 448.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 449-50.

<sup>110</sup> *Id.* at 449. The plaintiffs began their argument by asserting that civil rights actions under a federal claim do not provide for claims of state statutory privilege. *Id.* In describing a previous civil rights claim in federal court, the court utilized a four-part test to determine whether a physician-patient privilege existed:

First, is the identification of the individuals required for effective use of the data? Second, is the invasion of privacy and risk of psychological harm being limited to the narrowest possible extent? Third, will the data be supplied only to qualified personnel under strict controls over confidentiality? Fourth, is the data necessary or simply desirable?

*Id.* (quoting *Lora v. Bd. of Educ. of the City of New York*, 74 F.R.D. 565, 579 (E.D.N.Y. 1977)).

<sup>111</sup> *Id.* The court reasoned that the disease, transmitted through sexual conduct or shared needles, in conjunction with the approximation that were between 350 and 400 HIV-infected inmates, would require the plaintiffs to be aware of the names of the individual inmates for proper analysis. *Id.* Identification would be necessary because the experts may need to track HIV-patients' medical records over time and compare them with other patients. *Id.*

<sup>112</sup> *Id.* According to Connecticut's district court, the protective orders would suffice to limit the harm of disclosure and the information would only be disclosed to the necessary personnel. *Id.*

avored disclosure because the plaintiffs' experts needed to analyze the data in the records to form a legal argument.<sup>113</sup> Through this analysis, the court decided that full disclosure under a protective order was appropriate.<sup>114</sup>

In *Inmates of New York with HIV v. Cuomo*,<sup>115</sup> the Northern District of New York approached disclosure differently, deferring to the patients' privacy interests while requiring disclosure of the medical records.<sup>116</sup> The plaintiffs, inmates of the New York correctional facilities, brought a class action civil rights claim, arguing that the commissioner of the New York Department of Correctional Services and the governor of New York violated their Eighth, Ninth, and Fourteenth Amendment rights.<sup>117</sup> During discovery, the plaintiffs sought various HIV-infected inmates' documents to examine the facility's treatment.<sup>118</sup> The defendants resisted, claiming that the federal right to privacy protected medical records from individually identifiable disclosure.<sup>119</sup>

The court held the medical records to be relevant because this civil rights claim pertained to the manner in which the New York correctional facilities treated HIV-infected inmates.<sup>120</sup> Thus, the Northern District of New York ordered limited disclosure of the medical records as well as an extension of the existing protective order.<sup>121</sup> Specifically, the court required the defendants to compile and disclose information regarding HIV-infected inmates in the custody of the correctional department.<sup>122</sup> The court did not require disclosure of the names or identification numbers of those individuals, reasoning that identification of the patients was unnecessary to evaluate their treatment.<sup>123</sup> Also, the court ordered the defendants to produce the information requested within the plaintiffs' interrogatories and also to redact the documents to eliminate

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 450.

<sup>115</sup> No. 90-CV-252, U.S. Dist. LEXIS 1488 (N.D.N.Y. Feb. 7, 1991).

<sup>116</sup> *Id.* at \*10.

<sup>117</sup> *Id.* at \*1.

<sup>118</sup> *Id.* at \*3-4. The plaintiffs requested production of the names of all inmates infected with HIV, the names of inmates that have died of AIDS-related causes, the names of inmates receiving health services, the medical records for a specific HIV-patient, and the documents relating to two other inmates suffering from AIDS. *Id.* The plaintiffs sought the individual information of the patients, claiming that individual circumstances would be able to show problems in the prison health care system. *Id.* at \*5.

<sup>119</sup> *Id.* at \*6.

<sup>120</sup> *Id.* at \*1.

<sup>121</sup> *Id.* at \*7.

<sup>122</sup> *Id.* at \*10.

<sup>123</sup> *Id.*

## 866 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

any references to HIV-infected inmates.<sup>124</sup> The protective order that the court implemented precluded the parties from disclosing information beyond the scope of the litigation and required that the parties keep the information separate from other evidentiary material.<sup>125</sup> Thus, the court permitted discovery because the information was relevant and the protective orders maintained privacy.<sup>126</sup>

Unlike *Puget Sound*, *Meachum*, and *Cuomo*, the Florida appellate court deciding *South Florida Blood Service, Inc. v. Rasmussen*<sup>127</sup> granted immense deference to privacy concerns, prohibiting discovery of HIV-patient medical records.<sup>128</sup> In *Rasmussen*, the plaintiff served the South Florida Blood Service ("SFBS") with a subpoena for documents that disclosed the names and addresses of individual donors associated with his hospital records.<sup>129</sup> In response, SFBS moved to quash the subpoena, or alternatively, impose a protective order, claiming that the plaintiff did not show good cause for the invasion of privacy.<sup>130</sup>

The Florida appellate court reversed the trial court's decision to order disclosure, highlighting the records' lack of probative value.<sup>131</sup>

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<sup>124</sup> *Id.* The court reasoned, once again, that the identifiable material was not relevant to the plaintiffs' inquiry. *Id.* at \*11. Furthermore, the court reasoned that the redaction would not preclude the plaintiffs' constitutional claims. *Id.*

<sup>125</sup> *Id.* The protective order read as follows:

[N]o confidential material ordered disclosed shall be revealed except to the parties' attorneys and their staff, the parties' expert witnesses, and then only so that they may prepare to testify at trial, and the court and its staff; all confidential material shall be segregated from other evidentiary material, identified as confidential, and be kept under seal when filed with the court.

*Id.*

<sup>126</sup> *See id.*

<sup>127</sup> 467 So. 2d 798 (Fla. Dist. Ct. App. 1985).

<sup>128</sup> *Id.*, *aff'd sub nom.* *Rasmussen v. S. Fl. Blood Serv., Inc.*, 500 So. 2d 533 (Fla. 1987). The fact pattern in *Rasmussen* is similar to *Puget Sound* in that *Rasmussen* received a blood transfusion after an accident and subsequently contracted AIDS. 467 So. 2d at 800. *Rasmussen* died as a result, but a suit was instituted against the South Florida Blood Service ("SFBS"). *Id.*

<sup>129</sup> 467 So. 2d at 800.

<sup>130</sup> *Id.* The trial court denied the motion and ordered production. *Id.*

<sup>131</sup> *Id.* at 804. The court described Florida's discovery rule, which models the federal Rule:

*Florida Rules of Civil Procedure 1.280* allows for discovery of any matter, not privileged, that is relevant to the subject matter of the action. The scope of this rule, while recognized as being broad, is not without limitation. First, as the rule indicates, irrelevant and privileged matter is not subject to discovery. *Fla. R. Civ. P. 1.280(b)(1)*. Second, the discovery of relevant, non-privileged information may be limited or

Similar to the Washington Supreme Court's reasoning in *Puget Sound*, the Florida appellate court evaluated the competing interests of the plaintiff, the privacy interest of the donors, and public policy to determine whether the plaintiff showed good cause for disclosure of the information.<sup>132</sup> Addressing the plaintiff's interest first, the court held that this information was not important to the claim that SFBS's transfusion caused his transmission of HIV because none of the blood donors had HIV.<sup>133</sup> Thus, the probative value of the evidence was weak and the court deemed the plaintiff's interest in the material negligible.<sup>134</sup>

Next, the court addressed the privacy interest of the donors, holding that this interest weighed heavily against Rasmussen's interest in obtaining the records because of their personal nature.<sup>135</sup> Furthermore, the court rejected the argument that discovery would dissuade those with HIV from donating blood due to the lack of privacy, reasoning that the role of discovery was not to achieve political or social goals.<sup>136</sup> The court explained that if the information was relevant, the state would have a higher interest in including the information in order to achieve "fair and efficient resolution of disputes."<sup>137</sup>

In balancing these interests, the court considered public policy implications of disclosing the records, describing SFBS's goal of providing an adequate blood supply.<sup>138</sup> Despite its reluctance to defer to policy, the court accepted the policy argument favoring blood donation, recognizing that a breach in confidentiality might deter donation.<sup>139</sup> Ultimately, the court held that the circumstances required it to preclude

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prohibited in order to prevent annoyance, embarrassment, oppression or undue burden of expense.

*Id.* at 801 (citations omitted).

<sup>132</sup> *Id.* at 801-04.

<sup>133</sup> *Id.* at 801.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 802. The court reasoned that examination into the private details of the donors' medical history, drug use, and sexual practices delves into areas protected by the fundamental right of privacy. *Id.*

<sup>136</sup> *Id.* The court stated that "[t]he Discovery Rules were not designed to achieve such goals, but to fairly and reasonably aid the litigation process. It is for other agencies of government to act in detecting and preventing the spread of infectious diseases." *Id.* at 802, 803 n.9. In making decisions, the court asserted, trial courts must balance between the "interests served by the rules of discovery against the interests of the party seeking protection." *Id.* at 803.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 804.

<sup>139</sup> *Id.* This argument is that donation will decrease if donors recognize the possibility that their medical information may be disclosed. *Id.*



## 868 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

discovery.<sup>140</sup> The court's attention to relevance and the importance of privacy also appeared in disputes over the discovery of partial-birth abortion records, which is logical given the sensitive nature of both HIV and PBAB records.<sup>141</sup>

## 2. Partial-Birth Abortion Ban Challenges

Recent controversy has sprung from Congress' Partial Birth Abortion Ban,<sup>142</sup> leading doctors, hospitals, the Planned Parenthood Federation of America, and the National Abortion Federation to challenge the ban's

<sup>140</sup> *Id.* However, the court noted that this was a factual determination and that "we are not deciding that a blood bank's records are immune from discovery in all cases." *Id.*

<sup>141</sup> See *infra* Part II.C.2 (setting forth four decisions pertaining to discovery of partial-birth abortion records within disputes over the constitutionality of the PBAB).

<sup>142</sup> On November 5, 2003, Congress enacted a prohibition of partial-birth abortions. 18 U.S.C.A. § 1531; see also Nikki Katz, *Partial Birth Abortion—Abortion Ban Issue*, WOMEN'S ISSUES, <http://womenissues.about.com/od/partialbirthabortion/i/ispartialbirth.htm> (last visited Oct. 27, 2005) (describing the passing of this statute). The vote in favor of this ban was 281-142 in the House of Representatives and 64-34 in the Senate. Katz, *supra*. This federal statute makes it a crime to perform a partial birth abortion, providing a definition for a partial-birth abortion. 18 U.S.C.A. § 1531(b)(1). This particular section states:

[T]he term "partial-birth abortion" means an abortion in which the person performing the abortion—

(A) deliberately and intentionally vaginally delivers a living fetus until, in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the naval outside the body of the mother, for the purpose of performing an overt act that the person knows will kill the partially delivered living fetus; and

(B) performs the overt act, other than completion of delivery, that kills the partially delivered living fetus.

*Id.* After analyzing evidence from previous state PBAB challenges, Congress reached the conclusion that there were no situations that required a partial-birth abortion to preserve the health of the mother. *Id.*, congressional findings. Within these findings, Congress argued that evidence from the *Stenberg* trial showing that partial-birth abortions were never necessary was not included within the trial record because that information was not available until after the district court hearing occurred. *Id.* This information showed that this procedure is not within the realm of normal medical care. *Id.* Congress supported this conclusion by asserting that this procedure was generally disfavored throughout the country and that the "moral, medical, and ethical consensus" discouraged partial-birth abortions. *Id.*

Congress further asserted that this procedure presented such serious health problems that twenty-seven states have banned the procedure. *Id.*; see Douglas Johnson, *The Partial-Birth Abortion Ban Act—Misconceptions and Realities* (2003), available at <http://www.nrlc.org/abortion/pba/PBAa1110403.html>. According to this article, reported partial-birth abortions in the year 2000 were between 2,200 and 5,000. Johnson, *supra*. For further discussion of the construction of partial-birth abortion bans, see Carolyn Bower, Annotation, *Validity, Construction, and Application of Statutory Restrictions on Partial-Birth Abortions*, 76 A.L.R. 5th 637 (2004).

constitutionality.<sup>143</sup> In every case, these advocates argue that the federal ban does not adhere to the Supreme Court's previous decision listing how the government may ban partial-birth abortions.<sup>144</sup> In *Stenberg v. Carhart*,<sup>145</sup> the Supreme Court expressed that certain circumstances may exist that permit partial birth abortions, but that Nebraska's partial-birth abortion ban posed an undue burden on women seeking abortions because it did not provide an exception in the ban to preserve the health of the mother.<sup>146</sup> Because the federal partial-birth abortion statute does not provide an exception to preserve the health of the mother, these plaintiffs thus argue that it is unconstitutional.<sup>147</sup> In cases where the plaintiffs question the constitutionality of the federal PBAB, the federal courts have addressed the discovery Rules differently, scrutinizing relevance, redaction, and protective orders in a manner that disfavored disclosure, using privacy concerns as the main justification.<sup>148</sup>

In *Northwestern Memorial Hospital v. Ashcroft*,<sup>149</sup> the Seventh Circuit granted deference to the party opposing admission of medical records.<sup>150</sup>

<sup>143</sup> See *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (quashing a subpoena for medical records of a doctor who performed partial-birth abortions); *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004) (granting the enforcement of a subpoena against a New York hospital for medical records); *Nat'l Abortion Fed'n v. Ashcroft*, No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (E.D. Mich. Mar. 12, 2004) (ordering the University of Michigan to comply with a subpoena for medical records); *Planned Parenthood Fed'n of Am. v. Ashcroft*, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383 (N.D. Cal. Mar. 5, 2004) (denying discovery of medical records in light of patients' privacy interests).

<sup>144</sup> See *infra* notes 145-47 and accompanying text.

<sup>145</sup> 530 U.S. 914, 932 (2000).

<sup>146</sup> *Id.*

<sup>147</sup> See *Nw. Mem'l*, 362 F.3d 923; *Nat'l Abortion Fed'n* (N.Y.), 2004 U.S. Dist. LEXIS 4530; *Nat'l Abortion Fed'n* (Mich.), 2004 U.S. Dist. LEXIS 4491; *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383; see also 18 U.S.C.A. § 1531. Section 1531(a) states: "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered." 18 U.S.C.A. § 1531.

<sup>148</sup> See generally *Nw. Mem'l*, 362 F.3d 923; *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383.

<sup>149</sup> 362 F.3d 923 (7th Cir. 2004).

<sup>150</sup> *Id.* The government appealed the district court's decision to quash a subpoena under Rule 45(c) that requested production of medical records from a doctor who performed two types of partial-birth abortions. *Id.* at 924. The district court reasoned that HIPAA barred the production of the records, but the court of appeals disagreed. *Id.* The district court described that the Illinois statute regarding medical records preempted the HIPAA regulations, and because the Illinois statute did not allow even redacted medical records to be disclosed, discovery was barred. *Id.* at 925. The Seventh Circuit disagreed with the district court on this point, asserting that HIPAA regulations cannot impose state privileges under federal law. *Id.* at 926. Furthermore, the court pointed out that the HIPAA preemption regulation applies only to individually identifiable health information. *Id.* Thus, when individual information is redacted, state law preemption would not be appropriate. *Id.*

## 870 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

The Seventh Circuit criticized the district court's attempt to create a federal common law privilege for abortion records that would preclude discovery.<sup>151</sup> In fact, the Seventh Circuit stated that a federal common law privilege for abortion patients would be highly inappropriate because courts are "reluctant to embark on a case-by-case determination of the relative sensitivity of medical records of different ailments or procedures."<sup>152</sup>

Despite this criticism, the Seventh Circuit affirmed the district court's decision to deny discovery, hinging its reasoning upon the lack of relevance and the ineffectiveness of redaction.<sup>153</sup> Moreover, the Seventh Circuit upheld the district court's decision that the harm of the privacy infringement outweighed the medical records' probative value, determining that the government lacked a convincing argument that the medical records would assist in impeaching the plaintiff's expert witness.<sup>154</sup>

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* The Seventh Circuit recognized that many other types of records, such as HIV records, are as sensitive as records for partial-birth abortions. *Id.* Therefore, utilizing different approaches to privilege for different types of medical records would result in "arbitrary line drawing." *Id.*

<sup>153</sup> *Id.* at 927. Judge Posner asserted that the hospital claimed that the records lacked probative value and that the admission would cause a privacy loss to the patients. *Id.* He reasoned that the government only replied in generalities as to the relevance of the information, "to the point of being evasive." *Id.* However, the government did make the argument that the records may provide information to impeach the doctor that performed the partial-birth abortions, but the Seventh Circuit did not find this reason probative enough. *Id.*

<sup>154</sup> *Id.* The court stated:

At the oral argument we pressed the government's lawyer repeatedly and hard for indications of what he hoped to learn from the hospital records, and drew a blank. . . . The lawyer did suggest that if Hammond testified that patients with leukemia are better off with the D & X procedure than with the conventional D & E procedure but the medical records indicate that not all abortion patients with leukemia undergo D & X abortions, this would both impeach Hammond and suggest that D & X is not the only medically safe abortion procedure available to pregnant women with leukemia. But such information would be unlikely to be found in *Hammond's* records, given his strongly expressed preference for using the D & X method in the case of patients with fragile health.

*Id.* It is helpful to note that the government, in the Reply Brief for Appellant, did assert the reason for requesting the physician's medical records. Reply Brief for Appellant at 9-10, *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004). The government asserted in its brief that the physicians that challenged the PBAB pinpointed situations where partial-birth abortions were necessary to protect the health of the mother, which would support their contention that the PBAB is unconstitutional. *Id.*

Although the government sought a limited number of records in redacted form, the Seventh Circuit was not convinced that expunging the identifiable information would preserve the patients' privacy.<sup>155</sup> The Seventh Circuit reasoned that women who underwent partial-birth abortions were subjected to hostility and that it was probable that their identities would be revealed through investigations over the Internet.<sup>156</sup> Furthermore, the court asserted that despite complete redaction, discovery would invade the women's privacy, comparing the disclosure of the partial-birth abortion records to the distribution of nude pictures over the Internet without consent.<sup>157</sup> The Seventh Circuit showed great concern for the patients' privacy, readdressing the Government's responsibility to show the probative value of the records and criticizing its vague responses to inquiries regarding the use of the records.<sup>158</sup>

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Specifically, Dr. Hammond made various statements regarding his performance of the procedure. *Id.* For example, he stated that he remembered one patient whose life was not threatened but whose condition required the procedure. *Id.* The government argued that because Dr. Hammond relied upon his past personal performances of the abortions, the government should be able to "probe its basis just as any defendant [was] entitled to probe the basis of assertions made by a plaintiff to support his complaint." *Id.* Additionally, the government pointed out that the only records it sought were those where Dr. Hammond performed the now illegal procedure. *Id.* at 11. The government concluded its relevancy argument in its reply brief by stating:

To *meaningfully* challenge these assertions, the Government's experts must be able to consider the underlying cases to which he refers and the medical basis for his decision to use the banned procedure. Without that opportunity, any competing opinions would be hopelessly theoretical. Nor can the Government resort to the "available medical literature" for the simple reason that it does not exist on either side of the medical necessity debate.

*Id.*

<sup>155</sup> *Nw. Mem'l*, 362 F.3d at 929.

<sup>156</sup> *Id.* The court reasoned that the women were afraid that people would be able to sift through the information contained in the trial record addressing their medical and sex history and thereby decipher who they were from the information. *Id.* The court determined that the summaries the women provided of their histories may be sufficient for identification. *Id.*

<sup>157</sup> *Id.* The court also addressed the hospital's interest at stake, concluding that it would be against the hospital's interest to allow invasion of its patients' privacy. *Id.*

<sup>158</sup> *Id.* at 929-30. The court reasoned:

The government has had repeated opportunities to articulate a use for the records that it seeks, and it has failed to do so. What it would like to prove at the trial in New York, to refute Dr. Hammond, is that D & E is always an adequate alternative, from the standpoint of a pregnant woman's health, to the D & X procedure. But the government has failed to explain how the record of a D & X abortion would show this.

*Id.* at 930. In justifying the demands that the court made of the government, the Seventh Circuit stated that "Fed.R.Civ.P. 45(c) allows the fish to object, and when they do so the fisherman has to come up with more than the government has been able to do in this case

## 872 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

The first district court that addressed medical record discovery within the challenge to the PBAB followed the Seventh Circuit's reasoning.<sup>159</sup> In *Planned Parenthood of America v. Ashcroft*,<sup>160</sup> the Northern

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despite the excellence of its lawyers." *Id.* at 931. Essentially, because the government did not show precedent where an expert witness' medical records were used to impeach the witness, its argument for probative value was unconvincing. *Id.*

A strong dissent written by Judge Manion followed this opinion, criticizing the majority's HIPAA preemption, privacy, and probative value analyses. *Id.* at 933-40 (Manion, J., dissenting). First, in criticizing the majority's HIPAA analysis regarding individually-identifiable material, the dissenting opinion set forth all the information that must be redacted in order to satisfy HIPAA requirements presented in 45 C.F.R. § 164.514(b)(2)(i). *Id.* at 934. Judge Manion described this regulation to show that once this redaction occurs, HIPAA's privacy concerns have been fulfilled and the patients should not be able to claim a privacy violation due to the disclosure. *Id.* at 935. Because the majority discounted this point, argued Judge Manion, the decision derails HIPAA's policy. *Id.* at 939. The majority chose to conclude that the discovery order would subject an undue burden upon the patients because of the privacy cost. *Id.* at 935. Because the women would not know whose records the government sought, the privacy concern diminished. *Id.* at 936. The dissent made this conclusion based on the Supreme Court case, *Reproductive Service, Inc. v. Walker*, 439 U.S. 1307 (1978), which enforced a subpoena for medical records if the patients' names were redacted and a protective order was established. *Id.*

Further, the dissent criticized the majority's conclusion that little or no probative value existed in the records that the government sought. *Id.* The dissent described that the government actually requested information from both D & X and D & E procedures, which would be probative regarding the necessity of the partial-birth abortions under certain circumstances. *Id.* at 937. To also support the probative value of the medical records, the dissent pointed out that the expert whose records the government sought planned to testify regarding the safety of D & X over D & E partial-birth abortions. *Id.* Therefore, the dissent argued that this information was relevant not only to impeach the expert witness, but also to address the partial-birth abortions generally, and the majority should not have made an initial determination that the records were not probative enough for discovery. *Id.*

<sup>159</sup> See *infra* text accompanying notes 161-64. Currently, the Seventh Circuit is the only appellate court to decide appeals regarding the admittance of medical records in the PBAB challenges, and this decision proved newsworthy. Coffin, *supra* note 87 (presenting a strong criticism to the Seventh Circuit's reasoning); Patricia Manson, *7th Circuit Upholds Ruling to Protect Patients' ID's*, CHI. DAILY L. BULL., Mar. 29, 2004, available at LEXIS, News & Business File; *Patients Have No Interest in Redacted Records*, FED. DISCOVERY NEWS, Apr. 16, 2004, available at LEXIS, News & Business File (describing Judge Manion's dissenting opinion to *Northwestern Memorial*); *Patients' Privacy Interests Thwart Bid to Wrest Abortion Records from Illinois Hospital*, FED. DISCOVERY NEWS, Apr. 16, 2004, available at LEXIS, News & Business File (outlining the majority's holding and reasoning).

However, various district courts throughout the country have decided this discovery issue. *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004); *Nat'l Abortion Fed'n v. Ashcroft*, No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (E.D. Mich. Mar. 12, 2004); *Planned Parenthood Fed'n of Am., Inc. v. Ashcroft*, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383 (N.D. Cal. Mar. 5, 2004). The decisions differ, so the circuit courts' analyses of the "issues at stake" will hold significant precedence regarding the use of redacted medical records due to a possible Supreme Court decision regarding medical records and ultimately the federal Partial-Birth Abortion Ban. See generally *infra* Part III.

<sup>160</sup> No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383 (N.D. Cal. Mar. 5, 2004).

District of California denied discovery.<sup>161</sup> The court held that the government's motions to compel should be denied because the records were irrelevant, unduly burdensome, and the individual patients' privacy rights outweighed the government's interest in disclosure.<sup>162</sup> The California district court reasoned that the records were not relevant because the information the government sought was not within the records, and even if some information were relevant, the records would be marginally relevant at best.<sup>163</sup> Finally, the court concluded that redaction of all individually identifiable material nevertheless contained information that could result in identification.<sup>164</sup>

Conversely, the Eastern District of Michigan required production of the medical records in *National Abortion Federation v. Ashcroft*,<sup>165</sup> applying a method of reasoning similar to the HIV-patient cases.<sup>166</sup> In *National Abortion Federation*, the government served the University of Michigan Health System with a subpoena for medical records.<sup>167</sup> Because the government did not seek discovery of the patients' residencies and because the government asserted a need for this information to prepare a

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<sup>161</sup> *Id.* at \*3. In preparation for litigation, the government sought four types of records:

(1) records of "partial-birth abortions" or PBAs, as defined by the government; (2) records of abortions involving the use of chemical injections to effect intrauterine fetal demise; (3) any abortions during which complications arose; and (4) documents related to medical malpractice claims arising out of the performance of PBAs.

*Id.*

<sup>162</sup> *Id.* at \*4. The court additionally stated that any one of the reasons for denial was alone sufficient to deny the government's motions to compel. *Id.* at \*4-5.

<sup>163</sup> *Id.* at \*5. Further, the court reasoned that the production would be unduly burdensome because of the "enormity of the requests" within a short period of time. *Id.*

<sup>164</sup> *Id.* at \*6. Such information that may result in identification includes "types of contraception, sexual abuse or rape, marital status, and the presence of sexually transmitted diseases." *Id.* Also, the court requested that the government withdraw the Rule 45 subpoenas to non-parties for production of their medical records because they would likely be denied as well. *Id.* at \*7. Following this order denying the government's motion, the district court ruled that the PBAB was unconstitutional. *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F. Supp. 2d 957, 1034-35 (N.D. Cal. 2004). The court concluded:

[T]he Act is unconstitutional because it (1) poses an undue burden on a woman's ability to choose a second trimester abortion; (2) is unconstitutionally vague; and (3) requires a health exception as set forth by the Supreme Court in *Stenberg*. Permanent injunctive relief is appropriate given that plaintiffs have demonstrated that the Act violates their constitutional rights on the above three bases.

*Id.*

<sup>165</sup> No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (E.D. Mich. Mar. 12, 2004).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at \*1.

## 874 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

defense to the PBAB, the court ordered production of the materials.<sup>168</sup> However, the court required that the University of Michigan redact individually identifiable information from the records according to the protective order.<sup>169</sup> Also, the court formulated a protective order allowing the University of Michigan to label the information as confidential.<sup>170</sup> Finally, the court required that the government limit its use of the information to trial preparation.<sup>171</sup>

In the latest district court decision that applied a similar reasoning to Michigan's district court, the government sought medical records during discovery in *National Abortion Federation v. Ashcroft*.<sup>172</sup> The Government moved to enforce a Rule 45 subpoena against the New York Presbyterian Hospital for the physician-plaintiffs' medical records of their partial-birth abortion patients.<sup>173</sup> After the government issued the subpoena, the court issued a protective order for the redaction of all individually identifiable material from the medical records.<sup>174</sup> Despite the redaction order, the hospital claimed that redaction would not satisfy HIPAA requirements.<sup>175</sup> HIPAA preempted New York law with respect to the use of medical records, and HIPAA did not provide for an absolute privilege of medical records because the redaction requirements and

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<sup>168</sup> *Id.* at \*2.

<sup>169</sup> *Id.* at \*3. The court framed the order, stating:

[T]he University of Michigan (i) shall redact all patient identifying information from the records to be produced, as defined in the Protective Order entered in the underlying matter . . . and (ii) may further redact from those records information identifying the states of residence of any individual who has sought or obtained medical treatment from the University of Michigan.

*Id.*

<sup>170</sup> *Id.* "The University of Michigan may designate as 'Confidential Health Information' any record(s) produced pursuant to this order, or any portion(s) of any record(s) produced, and such designation shall render the designated record(s) subject to the protective order governing disclosure of such information." *Id.*

<sup>171</sup> *Id.*; see *Mich. Court OK's Federal Access of University Hospital's Abortion Records*, FED. DISCOVERY NEWS, Apr. 16, 2004, available at LEXIS, News & Business File.

<sup>172</sup> No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004).

<sup>173</sup> *Id.* at \*2.

<sup>174</sup> *Id.* at \*4.

<sup>175</sup> *Id.* at \*5. The court analyzed HIPAA's requirements to determine whether, as the plaintiffs asserted, New York law applied regarding the use of medical records. *Id.* The court pointed out that protected health information was "individually identifiable health information transmitted or maintained in any form or medium." *Id.* at \*7. According to HIPAA, protective orders must prevent the use of the information beyond the litigation and either return or destroy the records following the litigation. *Id.* at \*8. The court concluded that New York law did not apply because Congress did not intend to allow more stringent state regulations to apply alongside federal law. *Id.* at \*17.

protective orders eliminated privacy concerns.<sup>176</sup> Thus, the Southern District of New York decided that these measures sufficed to protect partial-birth abortion patients' privacy, enforcing the subpoena.<sup>177</sup>

In viewing the two categories of cases, the discovery Rules the courts have applied are essentially identical in terms of language and intent.<sup>178</sup> Additionally, HIV and partial-birth abortion records are comparable in terms of the social consequences associated with public disclosure of the records and the fact that the privacy interest in all medical records is not absolute.<sup>179</sup> Hence, it is disconcerting that those courts' applications of the discovery Rules differ significantly from one another.

### III. UNDESIRED AMBIGUITY FLOWING FROM DISCOVERY DECISIONS

*Now, as fond fathers,  
Having bound up the threat'ning twigs of birch,  
Only to stick it in their children's sight  
For terror, not to use, in time the rod  
[Becomes] more mock'd than fear'd*<sup>180</sup>

Concern for consistency in discovery Rule application requires reconciliation between the HIV-patient cases and two of the recent PBAB challenges.<sup>181</sup> The Advisory Committee drafting the Rules intended that courts apply them in a flexible and even-handed manner despite any political issues involved.<sup>182</sup> However, recent decisions considering the

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<sup>176</sup> *Id.* at \*21–22.

<sup>177</sup> *Id.* The court also addressed whether disclosure placed an undue burden upon the hospital, concluding that there was no Rule 45(c) claim. *Id.* at \*23. The hospital claimed that the disclosure would force it to deal with an increase in anger and mistrust as well as damage to its reputation. *Id.* The court disagreed, stating that production would not hurt the hospital's reputation because the court caused the production, not the hospital. *Id.* In August of 2004, the Southern District of New York granted the plaintiffs a permanent injunction, enjoining enforcement of the PBAB. *Nat'l Abortion Fed'n v. Ashcroft*, 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

<sup>178</sup> See also FED. R. CIV. P. 45. Compare WASH. SUPER. CT. CIV. R. 26 with FLA. R. CIV. P. 1.280 with FED. R. CIV. P. 26(b).

<sup>179</sup> Compare *supra* note 86 and accompanying text with *supra* note 87 and accompanying text (describing respectively the social consequences associated with living with HIV or having a partial-birth abortion).

<sup>180</sup> SHAKESPEARE, *supra* note 1, at act 1, sc. 3, ll.23–27. According to Vincentio, the population has begun to mock rather than follow the laws as children mock their parents' rules because they merely threaten punishment. *Id.*

<sup>181</sup> See *infra* Parts III.A–B.

<sup>182</sup> See *supra* note 30 (quoting the Advisory Committee's note recognizing that social concerns may be present in discovery disputes, but that courts should apply the rules equally).



## 876 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

admissibility of medical records do not apply the even-handed approach, causing confusion and inconsistent decisions.<sup>183</sup> These inconsistent decisions exemplify the tension that Vincentio faced in *Measure for Measure* when he realized that Angelo committed a crime for which he sentenced others to death.<sup>184</sup> Thus, to avoid inconsistent and unjust law enforcement, Vincentio substituted Angelo's unjust decisions with flexible law application.<sup>185</sup>

Courts' analyses of relevance and the undue burden of privacy infringement within two of the PBAB challenges demonstrate inflexible Rule application resulting from a lack of neutrality.<sup>186</sup> Hence, a comparison between the admissibility of HIV-patients' medical records and partial-birth abortion patients' records illustrates the current contradiction between the discovery Rules' intent and application.<sup>187</sup> Part III.A addresses the inconsistency between the HIV-patient cases and the PBAB challenges regarding the analysis of relevant material.<sup>188</sup> Part III.B expounds the second point of significant ambiguity between these two types of cases, which is the reasoning pertaining to privacy, protective orders, and redaction.<sup>189</sup>

#### A. Conflicting Relevance Applications

Whereas cases addressing the admissibility of HIV-patients' medical records analyze relevance according to the intent behind the discovery Rules, two PBAB challenges address relevancy in a detrimental manner

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<sup>183</sup> See *infra* Parts III.A-B.

<sup>184</sup> SHAKESPEARE, *supra* note 1, at act 2, sc. 1. Escalus, an ancient Lord representing the scales of justice, attempted to dissuade Angelo from imposing the death penalty. *Id.* He describes the criminal's character and that, because others have committed this act, the law should grant mercy in this situation. *Id.* Later, Vincentio decides to replace Angelo, issuing punishments that reflect the seriousness of the crimes. *Id.* at act 5, sc. 1, ll.525-30. Rather than putting men to death for committing sexual acts outside of marriage, Vincentio makes each man marry the woman he impregnated. *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> See *infra* Parts III.A-B.

<sup>187</sup> See *infra* Parts III.A-B.

<sup>188</sup> See *infra* Part III.A.

<sup>189</sup> See *infra* Part III.B. In both the HIV-patient cases and the PBAB challenges, the undue burden that parties claim as a challenge to discovery is that disclosure of the medical records infringes their fundamental right to privacy. See *supra* Parts II.C.1-2. Part III.B describes the inconsistency between the manner in which courts address privacy infringement in light of protective orders and redaction by comparing *Puget Sound, Meachum, Cuomo, and Rasmussen* with *Northwestern Memorial Hospital, Planned Parenthood Federation, National Abortion Federation* (Mich.), and *National Abortion Federation* (N.Y.). See *infra* Part III.B.

with respect to the requesting party.<sup>190</sup> Arguably, this disparity is due to a lack of neutrality in Rule application.<sup>191</sup>

For instance, in *Meachum*, the court questioned whether the HIV-patients' medical records were necessary and desirable to the civil rights claim in the correctional facility, aptly requiring disclosure of the medical records.<sup>192</sup> The Connecticut district court recognized the attenuated relationship between the medical records and the legal argument, but the court followed the Rules' intent for extensive discovery by ordering disclosure of the materials.<sup>193</sup> In this situation, the district court deciding *Meachum* illustrated that it was unnecessary for the medical records to be admissible at trial for parties to examine them during discovery.<sup>194</sup> Here, the court correctly utilized the flexibility that Rule 26 permits regarding relevance and thus provided a clear example of the intended application of Rules of discovery.<sup>195</sup>

Relevance was also an aspect of the Northern District of New York's analysis in *Cuomo*, which eventually limited discovery of HIV-patients' records.<sup>196</sup> In this decision, the district court properly recognized that the outer limit of relevance was the "subject matter involved in the action," reflecting the Rules' intent to permit extensive discovery and fostering fully developed claims.<sup>197</sup> The court handled the irrelevance of

<sup>190</sup> See *infra* text accompanying 206-30 (analyzing the manner in which the courts deciding *Northwestern Memorial* and *Planned Parenthood* addressed the issue of relevance).

<sup>191</sup> See *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 933-40 (7th Cir. 2004) (Manion, J., dissenting) (asserting that the majority inappropriately declared an opinion on the probative value of the medical records).

<sup>192</sup> *Doe v. Meachum*, 126 F.R.D. 444, 449 (D. Conn. 1989).

<sup>193</sup> *Id.* (reasoning that experts analyzing the treatment in the correctional facilities would need to identify the patients in order to study treatment over time).

<sup>194</sup> See *supra* notes 36-37 and accompanying text (describing that the standard for relevance is whether the material desired is "reasonably calculated to lead to the discovery of admissible evidence"). Expert analysis of the records would make the medical records relevant to the case so the inability to use the raw records at trial did not preclude discovery. *Meachum*, 126 F.R.D. at 449. Due to the fact that the party seeking discovery successfully showed good cause, the Connecticut district court permitted discovery. *Id.*

<sup>195</sup> See *supra* note 33 (describing that relevance should include information relevant to the subject matter on a showing of good cause); *supra* note 36 (citing an Advisory Committee note asserting the importance of applying the relevance standard flexibly).

<sup>196</sup> *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488, at \*7, \*10 (N.D.N.Y. Feb. 7, 1991) (reasoning that identifiable material on the medical records was not relevant to the legal claim, requiring redaction and a protective order).

<sup>197</sup> FED. R. CIV. P. 26(c) advisory committee's note (2000). The Advisory Committee's note describes that a gray line exists between information that is relevant to the claims of the particular suit and information that is relevant only to the subject matter of the action. *Id.* Because the latter may lead to claims or defenses eventually arising in an action, relevant material may be defined in terms of information that is relevant to the claim as well as the

## 878 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

the identifiable records not by precluding discovery, but by ordering redaction and a protective order. In doing so, the New York district court utilized Rule 26(c) protective orders, permitting the plaintiffs to examine the correctional facility in order to successfully proceed with their civil rights claims.<sup>198</sup> By refusing to question whether the substantive material within the medical records would be highly probative, the court recognized that this information could possibly lead to a legal claim, appreciating that Rule 26 requires only minimal relevance to permit discovery.<sup>199</sup> This approach provided an appropriate balance between protecting privacy and promoting access to the courts, which the Rules intend and the Supreme Court has reinforced.<sup>200</sup> Similar to the court in *Meachum*, the court deciding *Cuomo* posed another suitable Rule application by limiting discovery to all possible relevant information.

Unlike *Meachum* and *Cuomo*, in *Rasmussen* the court held that identification of donors that most likely did not have HIV was irrelevant, deferring to the Rules.<sup>201</sup> The court's reasoning was consistent with *Meachum* and *Cuomo* because in *Rasmussen*, the plaintiff did not meet Rule 26's initial relevance requirement, as the plaintiff wished to examine records that were void of HIV information in order to develop a claim against an individual with HIV.<sup>202</sup> Thus, the Florida appellate court deciding *Rasmussen* recognized that a party may not cross the outer limit of relevance in discovery requests, promoting Rule 26's intended goal to achieve extensive discovery of relevant claims.<sup>203</sup> Based on these flexible interpretations of the discovery Rules, an instance where the

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subject matter of the suit. *Id.* There was no foreseeable need for the inmates' identification within the subject matter of the claim because the legal claim referred to the general treatment of inmates. *Cuomo*, 1991 U.S. Dist. LEXIS 1488, at \*10.

<sup>198</sup> *Id.*

<sup>199</sup> See FED. R. CIV. P. 26(b) (permitting discovery of all relevant material).

<sup>200</sup> See *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (limiting discovery in order to avoid "annoyance, embarrassment, oppression, or undue burden or expense" after the parties attempt to resolve the dispute); *supra* note 48 and accompanying text (setting forth the protective orders the Rules encourage).

<sup>201</sup> *S. Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801-04 (Fla. Dist. Ct. App. 1985) (holding that information pertaining to donors to SFBS was not relevant because it did not help to prove from where the deceased plaintiff contracted HIV).

<sup>202</sup> *Id.* at 801 (describing that disclosure would not help the plaintiff to locate the individual that caused his contraction of HIV).

<sup>203</sup> *Id.* (determining that because the medical records did not even apply to the general subject matter of the case, which was to hold the individual who infected Rasmussen with HIV responsible, the material was not relevant).

relevance requirement was not fulfilled would likely be an obvious harassment attempt, permitting the court to preclude discovery.<sup>204</sup>

Two of the PBAB challenges have approached relevancy differently, straying from the intent of the Rules of discovery and causing confusion as to the correct approach that courts should take in determining relevancy of discovery requests.<sup>205</sup> Specifically, in *Northwestern Memorial*, the Seventh Circuit's holding that the government failed to show that the medical records were relevant contradicted the intent and prior application of the Rules of discovery.<sup>206</sup>

The Seventh Circuit's approach was flawed because, rather than merely deciding whether the government showed that there was a possibility that the medical records could produce admissible evidence, the court questioned whether the medical records would have significant impeachment value at trial.<sup>207</sup> Even if this prior determination was appropriate, the dissenting opinion as well as the government's Reply Brief described how the information would be relevant to impeach an expert witness and to address partial-birth abortions, demonstrating that the Seventh Circuit disregarded Rule 26's low relevance standard.<sup>208</sup>

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<sup>204</sup> See *supra* notes 34–35 and accompanying text (describing that the Rules' intent is to confine the outer limit of discovery to information relevant to the subject matter of the dispute).

<sup>205</sup> See *infra* text accompanying notes 208–24 (assessing and criticizing the decisions in *Northwestern Memorial* and California's *Planned Parenthood* because the reasoning strayed from the language and intent of the Rules); see also Coffin, *supra* note 87 (“[T]he court demanded that the government satisfy a heightened standard of relevance never before seen in the law.”).

<sup>206</sup> 362 F.3d 923, 927, 929 (7th Cir. 2004) (reasoning that the government's suggestion that medical records would be used for impeachment was insufficient because, according to the court, the desired information was “unlikely to be found” in the medical records). But see FED. R. CIV. P. 26(b)(1) (describing that information relevant to the subject matter of the controversy should fulfill the relevancy requirement for discovery as long as the proponent of discovery shows good cause).

<sup>207</sup> See *supra* notes 36–37 (setting forth that the good cause requirement for discovery is flexible and that a party may fulfill the relevancy requirement for discovery by showing that the material is “reasonably calculated to lead to the discovery of admissible evidence”).

<sup>208</sup> *Nw. Mem'l*, 362 F.3d at 933–40 (Manion, J., dissenting) (reasoning that the information had a higher probative value than the majority admitted because the medical records would address the safety of two abortion procedures, which could be used for impeaching the expert witness and to address the validity of the PBAB); Reply Brief for Appellant at 9–10, *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (setting forth the government's argument for justifying that the information within the medical records would be relevant to its case); see also *supra* note 36 and accompanying text (describing the 2000 Advisory Committee's reasoning that the standard for relevance should be flexible

## 880 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Reasonable minds differed as to whether the information was relevant to the subject matter or claims of the controversy, which should have weighed in favor of discovery due to the intent for broad discovery.<sup>209</sup> Thus, the court did not follow the flexible nature of Rule 26 when it prohibited discovery of the medical records, precluding the trier of fact from making the ultimate decision concerning the relevance of the medical records.<sup>210</sup>

The Northern District of California's decision in *Planned Parenthood* offers another example of faltered reasoning pertaining to the relevance of medical records in a PBAB challenge.<sup>211</sup> The Northern District of California placed an unnecessarily heavy burden upon the government to show relevance, which was inconsistent with the language and the application of Rule 26.<sup>212</sup> The court's sole explanation that the information the government sought would not be within the desired records was unsound.<sup>213</sup> The information was relevant to the partial-birth abortion procedure.<sup>214</sup> Therefore, a reasonable basis existed for the government to request the information, which arguably satisfied Rule 26's relevance requirement.<sup>215</sup> Although courts may consider the probative value of discovery against the burden it would place upon the parties producing the material, this court reasoned that low relevance *alone* would preclude discovery, which misconstrued Rule 26's intent to make the burden of proving relevance low.<sup>216</sup>

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and that "information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable").

<sup>209</sup> See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (asserting that courts should interpret relevance broad enough to include information that is likely to become an issue in the litigation).

<sup>210</sup> See *id.*

<sup>211</sup> No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383, at \*4-7 (N.D. Cal. Mar. 5, 2004) (denying discovery of partial-birth abortion records).

<sup>212</sup> *Id.* at \*4-5 (asserting that the marginal relevance alone would be sufficient to deny discovery of the medical records). But see FED. R. CIV. P. 26(b) (permitting discovery for *all* relevant material).

<sup>213</sup> 2004 U.S. Dist. LEXIS, at \*4-5 (describing the information that the government sought, which referred only to partial-birth abortion records); see *supra* note 34 and accompanying text (describing the 2000 Advisory Committee's decision that if the proponent of discovery provides a legal argument that the information is relevant to the subject matter of the claim, then that party has fulfilled the relevance requirement of Rule 26).

<sup>214</sup> *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383, at \*3.

<sup>215</sup> See FED. R. CIV. P. 26(b).

<sup>216</sup> *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383, at \*4 (reasoning that irrelevance, undue burden, or the balance between privacy rights, as well as the probative value of the information alone would have precluded discovery).

Furthermore, the Northern District of California's statement in *Planned Parenthood* that the information was "marginally relevant" should not have precluded discovery, given that Rule 26 only requires that the information *lead* to admissible evidence.<sup>217</sup> As a result of this determination, the government could not examine records that addressed problematic partial-birth abortions.<sup>218</sup> Thus, the government was unable to form possible arguments that would defend the PBAB's findings that this procedure is never necessary to sustain the health of the mother.<sup>219</sup>

Reconciling the approaches applied in HIV-patient cases and two of the PBAB challenges regarding the relevance of medical records is difficult.<sup>220</sup> Although the Rules of discovery should be applied equally, independent of underlying politics, it seems as though courts deciding the PBAB disputes placed a higher burden on the government for relevancy than the courts deciding whether to admit HIV-patients' medical records.<sup>221</sup> Requiring a higher relevance burden in PBAB challenges is illogical, given the equivalent desire to keep these records private due to the social stigmas attached to both record types.<sup>222</sup> Moreover, little difference exists in the role of each type of record in litigation, given that the purpose of attaining each type of record is to evaluate medical procedures and treatment generally.<sup>223</sup>

<sup>217</sup> See *id.* at \*5. But see *supra* note 36 and accompanying text (describing that information only related to the subject matter of the dispute was to be considered relevant).

<sup>218</sup> See generally *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383.

<sup>219</sup> See *supra* note 142 (setting forth congressional findings regarding partial-birth abortions).

<sup>220</sup> See *infra* text accompanying notes 222-30 (addressing the inconsistencies between the decisions).

<sup>221</sup> FED. R. CIV. P. advisory committee's note (1983) (asserting the need for the Rules' application to occur in an even-handed manner).

<sup>222</sup> Compare *supra* note 86 (describing the social problems that HIV and AIDS patients face), with *supra* note 87 (setting forth the social stigmas associated with partial-birth abortion patients).

<sup>223</sup> Compare *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488, at \*2 (N.D.N.Y. Feb. 7, 1991) (stating that the purpose obtaining medical records of HIV patients was to evaluate the correctional facility to support a civil rights claim), and *Doe v. Meachum*, 126 F.R.D. 444, 446 (D. Conn. 1989) (describing that the plaintiffs sought medical records as a part of the evaluation of the correctional facility), and *Doe v. Puget Sound Blood Center*, 819 P.2d 370, 372 (Wash. 1991) (discussing that the purpose of obtaining the medical records was to strengthen a negligence claim and form a claim against the blood donor), and *S. Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801 (Fla. Dist. Ct. App. 1985) (also discussing the intent to strengthen the negligence claim against the blood center and blood donor), with Reply Brief for Appellant at 9-10, *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (stating the government's position that

## 882 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Another illogical difference lies in the fact that discovery decisions rarely address relevance at all.<sup>224</sup> The decisions pertaining to HIV medical records rarely addressed relevancy, and when the court did raise a question of relevance, it analyzed specifically whether identifiable material was necessary and did not attempt to determine the relevance of the medical records generally.<sup>225</sup> However, the discovery decisions within the PBAB challenges questioned whether the substantive material that the government requested would be relevant to its argument.<sup>226</sup> Essentially, the courts prohibiting discovery of partial-birth abortion records required the government to provide a legal argument regarding the medical records before the government would be able to view them, which Rule 26 does not require.<sup>227</sup> Arguably, if the government had the ability to formulate a strong legal argument, this information would not be necessary; however, as the government argued, it could not effectively defend the PBAB without examination of the medical records.<sup>228</sup> Thus, it seems that the Seventh Circuit and the Northern District of California did not remain neutral because they granted greater deference to patients' privacy concerns, despite the relevance of the material and the availability of redaction and protective orders that function to maintain privacy.<sup>229</sup>

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obtaining the medical records would be relevant and essential to evaluate whether the partial-birth abortion would be necessary beyond the findings of Congress within the PBAB).

<sup>224</sup> See generally *Puget Sound*, 819 P.2d 370. In the court's reasoning, it never questioned the medical records' relevance to the dispute. *Id.*

<sup>225</sup> See *Meachum*, 126 F.R.D. at 449-50. The court's reasoning did not question the relevance of the medical records. *Id.* Also, the relevance discussion in *Cuomo* was quickly resolved and the court did not question whether the records were relevant, only whether patients' identities were relevant. 1991 U.S. Dist. LEXIS 1488, at \*1, \*7, \*10-11.

<sup>226</sup> In *Planned Parenthood*, the court questioned whether the medical records were more than "marginally relevant." No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383, at \*4-7 (N.D. Cal. Mar. 5, 2004).

<sup>227</sup> See Reply Brief for Appellant at 9-10, *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004) (stating that the government needed to examine the records in order to effectively determine the merit of Dr. Hammond's arguments that the partial-birth abortion was necessary to protect the health of the mother). Compare FED. R. CIV. P. 26(b) (allowing discovery of all relevant material), with *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 927, 929 (7th Cir. 2004) (reasoning that the government could not articulate a purpose for examining the medical records).

<sup>228</sup> See Reply Brief for Appellant at 9-10, *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923 (7th Cir. 2004).

<sup>229</sup> See FED. R. CIV. P. 26(c) (setting forth numerous possibilities for protective orders); *infra* Part III.B (addressing the inconsistent application of redaction and protective orders between the HIV record cases and two of the partial-birth abortion record disputes).

*B. Analyzing Privacy: Differing Applications of Redaction and Protective Orders*

Although the Rules permit courts to deny discovery, the Rules also permit and encourage modification of discovery requests through redaction and protective orders.<sup>230</sup> Unfortunately, inconsistency arises in comparing how the two categories of cases approach these privacy-shielding options.<sup>231</sup> While the HIV-patient cases again followed the intent of the Rules, the analyses applied in the PBAB challenges regarding privacy did not adhere to the discovery Rules' intent.<sup>232</sup>

Although the HIV-patient cases have applied redaction and protective orders differently, each decision provided an appropriate balance between promoting discovery and protecting privacy.<sup>233</sup> First, in *Puget Sound*, the Supreme Court of Washington refused to prohibit discovery without tangible evidence that disclosing medical records would adversely affect blood donation, which is consistent with the Supreme Court's holding in *Whalen*.<sup>234</sup>

Furthermore, in deciding *Meachum*, the District Court of Connecticut allocated appropriate concern to the privacy rights of the inmates.<sup>235</sup> This ruling exemplified the Rules' intent for courts to practice modifying over quashing subpoenas because modification simultaneously reduces the undue burden and permits discovery.<sup>236</sup>

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<sup>230</sup> FED. R. CIV. P. 26(c).

<sup>231</sup> Compare *infra* text accompanying notes 234–41 (addressing the sound reasoning within *Puget Sound*, *Meachum*, *Cuomo*, and *Rasmussen*), with *infra* text accompanying notes 242–63 (describing the flawed reasoning regarding redaction and protective orders in *Northwestern Memorial* and California's *Planned Parenthood*).

<sup>232</sup> See *infra* text accompanying notes 242–73; see also *Nw. Mem'l*, 362 F.3d at 933–40 (Manion, J., dissenting) (discussing the inappropriate deference that the Seventh Circuit granted the privacy claims).

<sup>233</sup> See *infra* text accompanying notes 235–41.

<sup>234</sup> See *Doe v. Puget Sound Blood Ctr.*, 819 P.2d 370, 377–78 (Wash. 1991); see also *Whalen v. Roe*, 429 U.S. 589, 601–04 (1977) (holding that the possibility of public disclosure alone is not an impermissible invasion of privacy).

<sup>235</sup> See *Doe v. Meachum*, 126 F.R.D. 444, 449–50 (D. Conn. 1989). It is unlikely that the privacy concern for inmates was granted less deference due to their incarceration because the court did not discuss the inmates' privacy right as less important than other citizens' right to privacy. *Id.*

<sup>236</sup> See FED. R. CIV. P. 26(c); see also *Nw. Mem'l v. Ashcroft*, 362 F.3d 923, 936 (7th Cir. 2004) (Manion, J., dissenting) (referencing *Reprod. Servs., Inc. v. Walker*, 439 U.S. 1307, 1308 (1978) (enforcing a subpoena for abortion records that were redacted)).



## 884 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Finally, the court's holding in *Cuomo* extends the preference for modification.<sup>237</sup> Requiring a protective order in addition to redaction deferred to the inmates' privacy interests.<sup>238</sup> In these cases, redaction and a protective order were sufficient means of lessening or eliminating the undue burden on the disclosing party.<sup>239</sup> Additionally, in *Rasmussen*, the Florida appellate court's discovery denial on the basis of privacy suitably applied discovery as a neutral procedural device.<sup>240</sup>

Disappointingly, the courts' holdings in the PBAB challenges contradict the holdings in the HIV-patient cases regarding privacy, redaction, and protective orders. As a result, these cases contradict the intent driving the discovery Rules.<sup>241</sup> The Seventh Circuit's response to the loss of privacy as an undue burden upon the partial-birth abortion patients in *Northwestern Memorial* illustrates a flawed application of the discovery Rules because it lacks neutrality.<sup>242</sup> Rather than attempting to modify the subpoena through a protective order, as required by the courts in *Meachum* and *Cuomo*, the Seventh Circuit chose to quash the subpoena, expressing concern that redaction would not protect the patients' privacy interest.<sup>243</sup> Thus, it flatly denied modification through a protective order and redaction, ignoring Rule 26's available protections.<sup>244</sup>

Furthermore, the Seventh Circuit's assertion that the patients' identities would be disclosed despite redaction amounted to mere speculation that will cause confusion in the application of the discovery Rules.<sup>245</sup> Any objection to discovery on the basis of privacy may present

<sup>237</sup> See *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488, at \*7, \*10-11 (N.D.N.Y. Feb. 7, 1991) (permitting discovery of the medical records for evaluation in the civil rights claim due to the protective order and redaction of individual patient information).

<sup>238</sup> See *id.*

<sup>239</sup> See *S. Fla. Blood Serv., Inc. v. Rasmussen*, 467 So. 2d 798, 801-04 (Fla. Dist. Ct. App. 1985) (explaining that identifying the blood donors in addition to producing medical records would cause an undue burden because identification had little probative value).

<sup>240</sup> See *id.*

<sup>241</sup> See *infra* text accompanying notes 243-63 (describing the courts' reluctance to utilize the options of redaction and protective orders in *Northwestern Memorial* and California's *Planned Parenthood*).

<sup>242</sup> See *Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929, 931-32 (7th Cir. 2004) (describing the court's reasoning that the invasion of privacy outweighed the probative value of the medical records).

<sup>243</sup> See *id.*

<sup>244</sup> See *id.*; see also FED. R. CIV. P. 26(c); BLACK'S LAW DICTIONARY 1281 (7th ed. 1999).

<sup>245</sup> Compare *supra* text accompanying note 157 (explaining the Seventh Circuit's argument that partial-birth abortion patients' identities may still be revealed despite redaction), with notes 76-82 and accompanying text (setting forth the background of HIPAA and the

an argument that identification may occur, but without a tangible danger that public disclosure will occur, courts should not grant deference to this argument because Rule 45(c) requires that parties claiming an undue burden must provide tangible reasons explaining why the court should limit discovery.<sup>246</sup> Essentially, this reasoning produced an implicit exception for abortion records due to the Seventh Circuit's heightened criticism of the ability of protective orders and redaction to maintain privacy for these particular patients.<sup>247</sup> This exception has the same effect as a privilege for abortion records, which the Seventh Circuit deemed inappropriate in the same opinion.<sup>248</sup>

Moreover, the Seventh Circuit's approach in *Northwestern Memorial* ignored HIPAA's privacy protection of only individually identifiable information from disclosure without consent.<sup>249</sup> As the dissenting opinion pointed out, the Seventh Circuit ignored the extensive requirements that HIPAA's regulation would place on the disclosure of medical records as well as HIPAA's encouragement of protective orders.<sup>250</sup> These deletions, which would include names, small geographic areas, the initial three digits of zip codes for areas with less than 20,000 people, and any dates that could indicate the age of the patient, would make identification nearly impossible.<sup>251</sup> To further insulate against disclosure, the Seventh Circuit could have implemented a protective order similar to those in *Cuomo* and *Meachum* that would require complete confidentiality during litigation.<sup>252</sup> However, the

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extensive regulation defining how records may be modified so they are not individually identifiable). *But see* Coffin, *supra* note 87 ("[A]lthough numerous other courts had previously concluded that privacy rights were not affected when patients' names and other identifying information were removed . . . this court reasoned that no amount of ID-scrubbing could stop this alleged invasion of privacy.").

<sup>246</sup> See FED. R. CIV. P. 45(c)(3)(A)(iv).

<sup>247</sup> See *Nw. Mem'l*, 362 F.3d at 923; *see also* Coffin, *supra* note 87 (discussing the court's odd protection of abortion records but not other medical records).

<sup>248</sup> See *id.* at 926 (describing the Seventh Circuit's reluctance to create a privilege for abortion records because there are many types of records, such as HIV-patient records, that are equally as sensitive as partial-birth abortion records).

<sup>249</sup> See *id.* at 933-34 (Manion, J., dissenting) (describing that the government sought only redacted materials and that redactions would protect the patients' privacy); *see also* 45 C.F.R. § 164.514(b)(2)(i).

<sup>250</sup> See *id.*

<sup>251</sup> See 45 C.F.R. § 164.512(b)(2)(i).

<sup>252</sup> See FED. R. CIV. P. 26(c) (describing the available protective orders that courts may implement); 45 C.F.R. § 164.512(b)(2)(i).

## 886 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Seventh Circuit, without addressing such possibilities, chose simply to quash the subpoena.<sup>253</sup>

Finally, the Seventh Circuit's refusal to utilize HIPAA's regulations or Rule 26's protective orders demonstrates the court's complete deference to speculative privacy concerns.<sup>254</sup> In implementing HIPAA, Congress intended to protect individually identifiable material from disclosure, and the extensive regulations reflect this concern.<sup>255</sup> As the dissent asserts, in refusing to follow the regulation addressing redaction, the Seventh Circuit's decision indirectly undermines HIPAA.<sup>256</sup> Additionally, the court's refusal to consider a protective order ignores Rule 26's intent to include as much information as possible in discovery.<sup>257</sup> It is suspect that the Seventh Circuit, considering the politically significant Partial-Birth Abortion Ban, did not consider redaction or protective orders, while the courts deciding the HIV-patient cases accepted these methods of protection.<sup>258</sup>

The California district court decision in *Planned Parenthood* followed the Seventh Circuit's approach, but this decision lacked justification for the claim that redaction would result in identification.<sup>259</sup> This line of reasoning, which questions the effectiveness of redaction, is unconvincing because there was no evidence in this case to show that following the guidelines set forth in HIPAA's regulation would fail to protect the patients' identities.<sup>260</sup> Moreover, the cases addressing the

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<sup>253</sup> See *Nw. Mem'l*, 362 F.3d at 933–40 (Manion, J., dissenting) (reasoning that redaction would be an appropriate means to protect the patient's identities).

<sup>254</sup> See *supra* notes 78–82 and accompanying text (describing that HIPAA protects only individually identifiable medical records).

<sup>255</sup> See *supra* notes 76–82 and accompanying text.

<sup>256</sup> See *Nw. Mem'l*, 362 F.3d at 939 (stating that the majority's decision ultimately damages Congress' finding that a partial-birth abortion is never necessary to protect a woman's health).

<sup>257</sup> See FED. R. CIV. P. 26(c) (permitting several types of protective orders for courts to preclude public disclosure of discovery material); *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *ACF Indus. v. EEOC*, 439 U.S. 1081, 1087–88 (1979); *supra* notes 27, 31 and accompanying text (describing the intent of the discovery Rules to allow broad examination of information relevant to the claims, defenses, and subject matter of the litigation).

<sup>258</sup> See *Nw. Mem'l*, 362 F.3d at 933–35 (Manion, J., dissenting) (criticizing the court's approach to redaction); *supra* note 48 and accompanying text (laying out the encouragement of modification and the possible protective orders available).

<sup>259</sup> See *Planned Parenthood of Am., Inc. v. Ashcroft*, No. C 03-4872 PJH, 2004 U.S. Dist. LEXIS 3383, at \*6–7 (N.D. Cal. Mar. 5, 2004).

<sup>260</sup> See *id.* (setting forth the court's reasoning that information, such as "types of contraception, sexual abuse or rape, marital status, and the presence or absence of sexually

admissibility of HIV-patients' records did not question whether redaction would suffice.<sup>261</sup> It is peculiar that the argument that redaction is ineffective arises only in cases addressing the constitutionality of the PBAB.<sup>262</sup>

Increasing the confusion that the decisions in *Northwestern Memorial* and *Planned Parenthood* caused are two additional challenges to the PBAB that did not adopt a highly stringent approach to discovery disputes.<sup>263</sup> These decisions provide an appropriate manner of discerning whether the Government may discover partial-birth abortion patients' medical records because the decisions reflect the flexible intent of the Rules and apply redaction and protective orders to protect patients' privacy concerns.<sup>264</sup> As such, it is unclear how the federal courts should analyze the admittance of partial-birth abortion patients' records in the challenges to the PBAB.<sup>265</sup> The potential danger lies in the fact that the Seventh Circuit is currently the only circuit court to rule on this issue, and it has applied flawed reasoning.<sup>266</sup>

The Seventh Circuit's reasoning, allowing deference to outside concerns within a procedural phase of litigation, demonstrates inappropriate Rule application.<sup>267</sup> As the cases addressing the PBAB are more recent than the HIV-patient cases, the PBAB challenges may set a trend in the manner in which courts address the admissibility of medical records.<sup>268</sup> This is an undesired trend for two reasons. First, the

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transmitted diseases," would result in identification, without providing how identification might occur).

<sup>261</sup> See *supra* Part II.C.1.

<sup>262</sup> See *Nw. Mem'l*, 362 F.3d at 933-35 (Manion, J., dissenting) (arguing that HIPAA's regulation would effectively protect the patients' privacy).

<sup>263</sup> See *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530, at \*2-8, \*17, \*21-23 (S.D.N.Y. Mar. 18, 2004); *Nat'l Abortion Fed'n v. Ashcroft*, No. 04-70658, 2004 U.S. Dist. LEXIS 4491, at \*1-3 (E.D. Mich. Mar. 12, 2004).

<sup>264</sup> See *Nat'l Abortion Fed'n* (N.Y.), 2004 U.S. Dist. LEXIS 4530, at \*2-8, \*17, \*21-23; *Nat'l Abortion Fed'n* (Mich.), 2004 U.S. Dist. LEXIS 4491, at \*1-3.

<sup>265</sup> Compare *Nw. Mem'l* 362 F.3d 923 (7th Cir. 2004) (quashing a subpoena for medical records of a doctor who performed partial-birth abortions), and *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383 (denying discovery of medical records in light of patients' privacy interests), with *Nat'l Abortion Fed'n* (N.Y.), 2004 U.S. Dist. LEXIS 4530 (granting the enforcement of a subpoena against a New York Hospital for medical records), and *Nat'l Abortion Fed'n* (Mich.), 2004 U.S. Dist. LEXIS 449 (ordering the University of Michigan to comply with subpoena for medical records).

<sup>266</sup> See *supra* text accompanying notes 243-59.

<sup>267</sup> See *supra* note 30 and accompanying text (citing an Advisory Committee's note that emphasizes the need to apply the Rules even-handedly).

<sup>268</sup> See *supra* text accompanying notes 242-59 (describing the problems with the Seventh Circuit's decision regarding the protection of privacy).

## 888 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

provisions within HIPAA were designed to protect patients from unconsented disclosure of private information.<sup>269</sup> However, two of the PBAB challenges ignore the ability of HIPAA to protect patients' privacy through redaction.<sup>270</sup> Thus, the reasoning that questions the validity of redaction undermines legislation intended to protect patients' medical records in light of current technology and the free flow of information.<sup>271</sup> Questioning whether HIPAA's regulations effectively protect patient privacy was inappropriate in *Northwestern Memorial* because the criticism was based on conjecture, not concrete instances of the regulation's ineffectiveness.<sup>272</sup>

The second problem of these inconsistent decisions lies in the judicial system.<sup>273</sup> As recently as 2000, the Advisory Committee has revised the federal Rules to encourage rather than limit discovery.<sup>274</sup> If the trend that scrutinizes relevance, redaction, and protective orders continues, federal courts will apply precedent that is disjointed from the Rules' intent.<sup>275</sup> Also, in light of privacy concerns, it is inappropriate to scrutinize the loss of privacy differently for partial-birth abortion and HIV medical records.<sup>276</sup> The willingness of two district courts to utilize the same analysis for the loss of privacy in discovery of partial-birth abortion patients' medical records as the analysis used in the HIV-

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<sup>269</sup> See *supra* notes 78–82 and accompanying text.

<sup>270</sup> See generally *Nw. Mem'l*, 362 F.3d at 923; *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383.

<sup>271</sup> See 42 U.S.C.A. § 1320d-6(b); *supra* notes 78–82 and accompanying text (providing a summary of the HIPAA privacy rule).

<sup>272</sup> See *supra* text accompanying notes 246–49 (describing that the Seventh Circuit's criticism of redaction was unfounded).

<sup>273</sup> See *Herbert v. Lando*, 441 U.S. 153, 177 (1979); *ACF Indus. v. EEOC*, 439 U.S. 1081, 1087–88 (1979) (describing that the lower courts have the responsibility to make correct discovery decisions because these decisions are difficult to reverse, as they are based on discretion).

<sup>274</sup> See *supra* notes 33–36 (setting forth the intent of the 2000 Advisory Committee to apply a flexible good cause standard, implying a broad scope of discovery).

<sup>275</sup> Compare *Nw. Mem'l*, 362 F.3d 923 (quashing a subpoena for medical records of a doctor who performed partial-birth abortions), and *Planned Parenthood*, 2004 U.S. Dist. LEXIS 3383 (denying discovery of medical records in light of patients' privacy interests), with *Nat'l Abortion Fed'n v. Ashcroft*, No. 03 Civ. 8695 (RCC), 2004 U.S. Dist. LEXIS 4530 (S.D.N.Y. Mar. 18, 2004) (granting the enforcement of a subpoena against a New York Hospital for medical records), and *Nat'l Abortion Fed'n v. Ashcroft*, No. 04-70658, 2004 U.S. Dist. LEXIS 4491 (E.D. Mich. Mar. 12, 2004) (ordering the University of Michigan to comply with a subpoena for medical records).

<sup>276</sup> See *supra* notes 86–87 and accompanying text (describing the similar social stigmas attached to HIV records and partial-birth abortion records); *supra* note 152 and accompanying text (describing the Seventh Circuit's hesitation to treat abortion records differently from other medical records).

patient cases indicates that the two types of medical records deserve similar discussion.<sup>277</sup> Additionally, the Seventh Circuit's rejection of an exception for partial-birth abortion records reinforces that the Rules should apply to each type of medical record similarly.<sup>278</sup> Therefore, granting more deference to the privacy interests of partial-birth abortion patients than to HIV-patients is inappropriate.<sup>279</sup>

In light of the confusion these cases present and the attention the PBAB challenges will receive due to the political ramifications of the decision, the federal courts face the demanding task of striking the appropriate balance between patients' privacy and the probative interest of medical records.<sup>280</sup> Accordingly, these courts must make these decisions without considering the merits driving these challenges to the Partial-Birth Abortion Ban.<sup>281</sup>

#### IV. MODEL APPROACH TO CURB THE ABUSE OF DISCOVERY RULES

*[S]o our decrees,  
Dead to infliction, to themselves are dead,  
And liberty plucks injustice by the nose; . . .  
[A]nd quite athwart [g]oes all decorum.*<sup>282</sup>

Potential ambiguity in decisions regarding the admission of medical records lies in the courts' application of clearly established rules. Therefore, just as Vincentio substituted his judgment for Angelo's by

<sup>277</sup> Compare *Nat'l Abortion Fed'n* (N.Y.), 2004 U.S. Dist. LEXIS 4530 (granting the enforcement of a subpoena against a New York Hospital for medical records), and *Nat'l Abortion Fed'n* (Mich.), 2004 U.S. Dist. LEXIS 4491 (ordering the University of Michigan to comply with a subpoena for medical records), with *Inmates of N.Y. with HIV v. Cuomo*, No. 90-CV-252, 1991 U.S. Dist. LEXIS 1488 (N.D.N.Y. Feb. 7, 1991) (ordering discovery of HIV-infected inmates' medical records), and *Doe v. Meachum*, 126 F.R.D. 444 (D. Conn. 1989) (permitting discovery of HIV patient records to evaluate the correctional facilities treatment of HIV-infected inmates), and *Doe v. Puget Sound Blood Center*, 819 P.2d 370 (Wash. 1991) (permitting discovery of blood donor's medical records).

<sup>278</sup> See *Nw. Mem'l*, 362 F.3d at 926 (reasoning that because HIV-patient medical records had similar sensitivity to partial-birth abortion records, different treatment for the two types of records would be inappropriate).

<sup>279</sup> *Id.*

<sup>280</sup> See *supra* text accompanying notes 46–47 (describing that courts must balance between the competing factors when the party opposing discovery claims an undue burden); see also Manson, *supra* note 159 (describing the Seventh Circuit's decision, commenting that these decisions are part of a "fight being fought on several battlefields across the country").

<sup>281</sup> See *supra* note 30 and accompanying text.

<sup>282</sup> SHAKESPEARE, *supra* note 1, at act 1, sc. 3, ll.27–31. Vincentio concludes his lament about the state of affairs in Vienna by saying that because the laws have not been inflicted on the people, they are, in essence, dead. *Id.* Hence, all order within the city has been lost. *Id.*

applying flexibility to the law at the conclusion of *Measure for Measure*, the federal courts' application of the Rules of discovery should reflect the intent to foster the just adjudication of every claim.<sup>283</sup> A model approach, synthesized from the decisions described herein, would set the appropriate balance between the competing interests of patient privacy and the probative value of medical records. Hence, these general guidelines will remind federal courts to maintain the Rules' intent.<sup>284</sup>

Revision of the Rules themselves would be inappropriate because the problem lies in recent rule application that may set a trend divergent to the Rules' purpose.<sup>285</sup> Thus, a general two-step approach that encompasses the discovery Rules' intent curtails the problems with relevance and the implementation of redaction and protective orders.<sup>286</sup> The ultimate impact of this approach favors discovery of medical records, emphasizing the application of redaction and protective orders.<sup>287</sup> This is a model approach, not a model decision, so this Contribution recognizes that permitting discovery may not be appropriate in every situation.<sup>288</sup>

#### A. Medical Records Are Generally Relevant

The first step in the model judicial reasoning is to address relevance with flexibility, favoring discovery. In finding that the medical records are relevant, courts should begin with the baseline justification that the medical records need not be admissible in trial for examination during the discovery process.<sup>289</sup> Thus, if the proponent of the records can show that information in the records offers potentially admissible evidence, then the relevance requirement has been fulfilled.<sup>290</sup> Therefore, it should

<sup>283</sup> *Id.* Vincentio, realizing that Angelo was guilty of the same actions as Claudio, delegated punishments at the conclusion of the play. *Id.* at act 5, sc. 1. However, none of these punishments included the death sentence. *Id.*

<sup>284</sup> See *supra* Part II.A (setting forth the purpose of the Rules).

<sup>285</sup> See generally *supra* Part III (analyzing the inconsistent Rule application in two recent federal court decisions).

<sup>286</sup> See *infra* Parts IV.A-B.

<sup>287</sup> See *supra* Part III.B (describing the value of utilizing redaction and protective orders in discovery disputes); see also FED. R. CIV. P. 26(c).

<sup>288</sup> For instance, there may exist situations where the use of medical records may be completely inappropriate and simply a means to harass the opposing party. In that instance, this approach would not need to apply and the court would simply deny discovery in order to "protect [the] party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

<sup>289</sup> See *id.* at 26(b).

<sup>290</sup> See *id.*

be quite clear when a party is making a completely irrelevant request, and in that case courts should quash the subpoena or refuse the discovery request.

Problems in analyzing relevance may arise when there is a tangential relationship between the medical records and a legal argument.<sup>291</sup> The opposing party may claim that it is irrelevant to a “claim or defense of any party.”<sup>292</sup> However, because Rule 26 provides that “good cause” may allow discovery of information within the subject matter of the claim and good cause is a flexible standard, a legal argument should suffice.<sup>293</sup> Thus, even with a tangential relationship, as long as the proponent makes a feasible legal argument that the information sought may lead to admissible evidence, the relevance analysis is complete.<sup>294</sup>

Additionally, if the courts adhere to the intended flexible standard for relevance, they should not accept arguments claiming that the information is only marginally relevant. When the opposing party only claims lack of relevance, not that admission results in an undue burden, courts must not measure the level of relevance.<sup>295</sup> If the sole argument is relevance, the only test that Rule 26(b) sets forth is whether the information is “reasonably calculated to lead to admissible evidence.” Thus, if the proponent of the medical records fulfills this goal, the court’s analysis of relevance should be satisfied.

However, if the opposing party complains that admitting the medical records would create an undue burden, the analysis of relevance must change. The courts must examine the level of relevance, the burden upon the parties involved, the issues of the litigation, and the importance of discovery to the dispute.<sup>296</sup> The courts must consider the value of redaction and protective orders because a large aspect of this balancing test measures the burden of discovery and the issues involved. Thus, in addressing these two options, courts may solve the problem of loss of privacy, which is often a significant issue at stake in the discovery

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<sup>291</sup> See *supra* notes 33–35 and accompanying text (describing that not all discoverable information is clearly relevant to the claim, allowing the use of the good cause standard to permit discovery of material relevant to the subject matter of the dispute).

<sup>292</sup> FED. R. CIV. P. 26(b).

<sup>293</sup> See BLACK’S LAW DICTIONARY 213 (7th ed. 1999).

<sup>294</sup> See *Doe v. Meachum*, 126 F.R.D. 444, 449 (Wash. 1991) (describing that the medical records would later become relevant after expert analysis, thus fulfilling the relevance requirement).

<sup>295</sup> See *supra* notes 208–20 and accompanying text (describing that it is inappropriate to quantify relevance without an undue burden claim).

<sup>296</sup> See *supra* text accompanying note 47.



## 892 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

of medical records.<sup>297</sup> An imperative point that the courts must not ignore is that consideration of the issues at stake must be evenly applied, and the courts cannot allow the inclusion of public policy considerations within discovery to make these procedural rules a means of destroying legal arguments.<sup>298</sup>

*B. Admit the Redacted Records and Issue a Protective Order*

The second part of the model judicial reasoning supports imposing redaction and protective orders. Courts should accept that redaction and protective orders are suitable means of maintaining patient privacy.<sup>299</sup> The model approach asserts that the parties must have access to all possible information to develop all necessary legal arguments.<sup>300</sup> Thus, parties wishing to examine medical records for possible arguments must, at the very least, examine them. If disclosure of the information within the records would breach the patients' privacy, then the information must be redacted.<sup>301</sup> Because the patient is no longer identifiable once redaction occurs, there is no reason to address privacy further.<sup>302</sup>

Despite redaction, opposing parties may claim that redaction may still result in identification due to the nature of the medical records sought.<sup>303</sup> At this point, courts must impose a protective order, barring parties from disclosing the information in the medical records beyond litigation. This option should satisfy both parties, as it allows discovery of the medical information while protecting the patients from public disclosure of personal information.<sup>304</sup> Also, as Rule 26(c) indicates, there are various means by which the courts can implement a protective

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<sup>297</sup> See FED. R. CIV. P. 26(c).

<sup>298</sup> See *supra* note 30.

<sup>299</sup> See FED. R. CIV. P. 26(c); *supra* notes 78–82 and accompanying text (describing the requirements of HIPAA, which protects only individually identifiable information and therefore deems that no privacy rights exist for information that has been redacted).

<sup>300</sup> See generally FED. R. CIV. P. 26(b).

<sup>301</sup> See generally 45 C.F.R. § 164.514(b)(2)(i) for a description of the various items that must be deleted to ensure full redaction and negate any privacy interest.

<sup>302</sup> See *id.*

<sup>303</sup> For instance, the opposition may claim that in a small community, minimal information within abortion records may still result in identification because of public familiarity with reputations of the women in the community.

<sup>304</sup> See FED. R. CIV. P. 26(c)(1)–(8) for a listing of the different approaches that courts may use for protective orders.

order.<sup>305</sup> Therefore, the courts may accommodate different situations that may arise.<sup>306</sup>

### C. *The Model Approach*

A sample methodology for the admission of medical records follows the structure of Rule 26 and implements the Rule's tendency favoring disclosure.<sup>307</sup> This sample lies in favor of the discovery of the medical records despite arguments opposing the relevance of the medical records and claiming that the admission presents an undue burden. In order to clearly exemplify the Rules' language and intent, federal courts may find the following sequence beneficial:

The threshold question the court must ask is whether the information contained in the medical records is relevant. If the records are not relevant, then this Court must quash the discovery order. However, as long as the proponent shows that a reasonable person could conclude that the medical records may result in admissible evidence, then this Court will deem the medical records relevant. The proponent does not need to assert a legal argument at this time, only a logical relationship between the medical records and a claim or defense of this matter.

The party opposing admission argues that the information is not relevant for two reasons. First, it argues that the information in the medical records is not directly related to a claim or defense. This argument fails because the proponent of the discovery of this information has fulfilled the flexible good cause requirement by showing that the information is relevant to the subject matter of the dispute. Specifically, the proponent asserted that the medical records likely contain information related to a defense that may be admissible at trial. Therefore, the opponent's argument is insufficient.

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<sup>305</sup> *See id.*

<sup>306</sup> *See id.* For instance, rather than producing medical records, it may be possible to take the deposition of a doctor that performed the medical procedure. *See id.* Additionally, the court may require that the deposition cover only certain topics. *See id.* Thus, the court may preclude discovery of personal information about the patients, protecting their privacy.

<sup>307</sup> *See generally id.* at 26(b),(c).

Second, the opposition claims that the information is only marginally relevant. Again, this argument fails. The party opposing this disclosure claims that admission of the medical records imposes an undue burden. Under this claim, this Court must balance the burden of admission against the benefit of disclosure, taking into account the needs of the case, the amount in controversy, the resources of the parties, the importance of the issues at stake, and the importance of the medical records in resolving this dispute.<sup>308</sup> Therefore, this Court must quantify the relevance of the medical records to the present litigation. The proponent of this discovery request has asserted that the medical records may contain information that may provide additional evidence regarding damages. This information is not highly relevant because the proponent cannot specify what is sought. This Court must balance the benefit of this information against the burden it presents, examining other issues involved. This Court may therefore examine the potential loss of patient privacy that may occur in disclosing the medical records.

Without modification, admitting the medical records will result in a public disclosure of the records. Therefore, potentially embarrassing and personally damaging information will become accessible to the public. Recognizing that privacy is a fundamental, albeit conditionally fundamental right, this Court orders modification of this discovery request. In order to protect the individuals within the medical records, this Court orders redaction of the records, where all information that may be individually identifiable will be deleted. The records shall be modified according to the requirements of HIPAA.<sup>309</sup>

Additionally, this court orders a protective order according to Rule 26(c) to protect the identities of the patients and alleviate the asserted undue burden.<sup>310</sup> Thus, the records will be filed in a sealed envelope to be

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<sup>308</sup> *Id.* at 26(b)(2).

<sup>309</sup> *See* 45 C.F.R. § 164.514(b)(2)(i).

<sup>310</sup> FED. R. CIV. P. 45(c).

opened only for the use of litigation, and the information within the documents will not be revealed beyond the scope of the litigation.<sup>311</sup> At no time may either party identify the patients within the medical records. Thus, after balancing the various factors in play and protecting the objecting party's privacy interest, the motion to quash the subpoena for production of documents is denied, and the discovery subpoena stands subject to the protective order and redaction requirement above.

In the alternative, if the opposing party did not claim that the admission was an undue burden, the argument would still fail. Rule 26(b)(1) allows discovery of relevant material.<sup>312</sup> It does not state that only highly relevant information may be discovered or that marginally relevant information is not discoverable. Therefore, this Court will not examine the level of relevance as the opposition requests.

As this is a sample approach, the federal courts must modify the reasoning according to the facts and arguments each party presents. However, this general approach will aid the courts in addressing the Rules correctly and according to the liberal intent of the rules. The courts must grant credence to redaction and protective orders, as Rule 26 provides for various ways in which the court may modify discovery orders.<sup>313</sup> This approach recognizes that parties wishing to develop strong legal arguments must examine various avenues, and that it is often impossible to create an in-depth legal argument to support a discovery request. If the federal courts adopt this general approach to all discovery disputes pertaining to medical records, decisions will be more consistent.

## V. CONCLUSION

The Rules of discovery intend to open the door to a wide array of investigation, allowing each party to examine every possible legal argument. Some topics of inquiry, namely medical records, offer information of a nature that the patient may not wish to become public. Thus, a tension exists between the encouragement of aggressive litigation tactics and the hesitancy to invade privacy rights.

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<sup>311</sup> See *id.* at 26(c).

<sup>312</sup> See *id.* at 26(b).

<sup>313</sup> See *id.* at 26(c).

896 VALPARAISO UNIVERSITY LAW REVIEW [Vol. 40]

Recent decisions reflecting this tension assert reasoning that diverges from both past decisions as well as the purpose of Rule 26. In comparing discovery decisions regarding HIV-patients' medical records with decisions regarding partial-birth abortion patients' medical records, the more recent PBAB challenges present flawed decisions that deny discovery. As the Seventh Circuit presented a line of reasoning that may serve as a reference for future PBAB challenges, the federal courts must avoid eroding procedural rules because of the policy interests at play. Despite the social and political ramifications of the PBAB, procedural matters must remain such, and a preliminary decision must not determine this statute's constitutionality.

The federal courts may maintain the Rules of discovery by implementing reasoning consistent with the language of Rule 26. Additionally, the courts must recognize the value of the numerous protective orders that Rule 26 offers. Without this recognition, parties will lose legal arguments before they form, granting substantive value to a procedural step in litigation. Thus, just as *Measure for Measure's* Vincentio approached the application of law with flexibility in order to provide proportionate and just punishment, the federal courts must utilize the flexible nature of the Rules by promoting extensive discovery through redaction and protective orders.

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\* J.D. Candidate 2006, Valparaiso University School of Law. I would like to thank my cousin, Father David Nuss, who inspired this Note, as well as Professors Ivan Bodensteiner and Clare Nuechterlein, who provided excellent comments and advice during the notewriting process. Also, I would like to thank my parents, Jane and Mike Schumaker, and my siblings and their families, Julie, Kyle, Kyle Jr., Barb, Chris, C.J., Mike, Erin, Katie, Brandon, Sara, Mary, Lisa, Tom, Kelly, Tim, and Theresa, for providing great distractions to writing this Note. Finally, I would like to thank Joe Nichele for his invaluable patience, logic, and humor.